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THE  
LAW OF COLLIERIES:

A HANDBOOK OF  
THE LAW AND LEADING CASES.

EDITED BY  
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## PREFACE TO THE FOURTH EDITION.

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THE exhaustion of the last edition of this work (formerly entitled "Collieries and Colliers") and several alterations of the law affecting this kind of property concur to make it advisable to publish a fresh edition. The author of the work has been joined in the preparation of the present edition by Mr. David Lewis, of the South Wales Circuit, who has had ample opportunities of becoming acquainted with the various incidents of the working of coal. No work has hitherto been published which treats specially of the legal matters connected with Collieries, to the exclusion of other kinds of mining. But the vast interests involved in coal-mining fully justify the production of a work in which those interests alone will be the subject. The successive chapters will be found to treat more or less fully of all the legal incidents of this kind of mineral property, such as the right to coal under copyhold lands and commons, railways, and canals. There are chapters on leases and covenants; on title by prescription, and the statute relating to that title; on fixtures; rights of way; rights connected with the flow of water, both natural and artificial, on the surface and subterraneous. The latest leading cases relating

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to all these subjects have been carefully examined and quoted. There is a chapter on partnership, which has been for the most part rewritten, and brought into accord with the law as it exists at the present day. The relations between the proprietors and occupiers of collieries and the workmen employed by them have been defined and explained as accurately as such relations admit of definition and explanation, and all questions commonly raised between them as to stoppage of work, misconduct, &c., have been fully considered. The responsibility of employers for negligence under the Employers' Liability Act has been discussed and illustrated by all the most valuable judgments that have appeared in the Reports since the passing of the Act; which, on account of its importance, is set out verbatim.

The law and practice of rating collieries has required much attention. The chapter on rating has been substantially rewritten, and is, it is believed, the fullest treatise on this peculiar branch of assessments that is to be found in any book. The Editors have had the advantage of having this chapter perused and considered by Mr. Hedley, of Sunderland, who has had a large experience in valuing and rating mineral property and works. He favoured them with advice and suggestions for which they are much indebted to him.

The chapter on rating is followed by others on injuries to the surface caused by coal-mining, and the right to support; on inundations and barriers; working out of bounds, truck, and the inspection of coal-mines under the Act of 1872, which important statute is set out at length, with notes of such cases as have

been decided upon its sections, and references to various Home Secretaries' circulars, etc. The method generally pursued has been to select the leading cases illustrating the matters under consideration, and to quote verbatim the whole or parts of the judgments. This plan has been adopted, because it will generally be found that the spirit and meaning of any rule of law is more easily apprehended and ascertained by reading the whole or part of one or two luminous judgments than by the perusal of various short summaries of many decisions.

In the Appendix are inserted several forms of leases, and a collection of clauses and covenants, which may be used according to circumstances. A copious index will facilitate reference to all the information in the text.



# CONTENTS.

---

## CHAPTER I.

PAGE

The Nature of Property in Coal—Severance of the Ownership of the Surface from that of subjacent Minerals—Right to Minerals in Copyhold Lands—Customary and Prescriptive Rights of Tenants as to Coal—Enfranchisement of Copyholds—Right to Minerals in Commons—Manorial Rights—Evidence of a Manor—Right to work Minerals when severed from the Inheritance—Rights of Persons with Limited Interests . . . . .	1
--	---

## CHAPTER II.

Leases of Mineral Property—What is a Lease—Words of Demise—How a Lease may be made—Statute of Frauds—By whom Leases may be granted—Settled Land Act—Parts of a Lease described—Construction of Covenants—Parol Evidence to explain, &c.—What are usual Covenants—Conditions and Provisions—Power to terminate the Lease—Distinction between a Lease and a Licence: also between a Lease and an Agreement for a Lease—Re-entry—Forfeiture—Waiver—Relief in Equity—Licence to Assign—Statutable Enactments as to Licence to Assign and Waiver—Conveyancing Act, 1881 . . . . .	23
--	----

## CHAPTER III.

PAGE

Covenants to work the Coal—Cases decided thereon— Covenant to leave a Barrier: to keep in repair—Winning by Instroke—What Covenants run with the Land— Means of putting an end to a Lease—Surrender— Merger—Notice to Quit—Equitable Relief—Specific Performance—Licences to work Minerals—Distress for Rent—Stamps and Registration . . . . .	49
--	----

## CHAPTER IV.

Title by Prescription; Definition of this kind of Title— Distinction between Custom and Prescription—Meaning of the Term “Legal Memory” before the Statute—Act for shortening the Time of Prescription quoted . . . .	77
--	----

## CHAPTER V.

Fixtures—Meaning of the Term—Between the Heir and Executor of the same Owner of the Inheritance: be- tween the Tenant for Life, &c., and the Remainder- Man or Reversioner: between Landlord and Tenant— Leading Cases on each—Fixtures must be severed during the Term—When they pass to the Trustee of a Bankrupt: as between Vendor and Vendee, Mortgagor and Mortgagee—Where there are special Stipulations in the Lease—Leading Case on the Construction of such a Stipulation . . . . .	81
--	----

## CHAPTER VI.

Rights of Way—Public and Private Ways—Origin of a Right of Way—Prescription Act—Right of Way by Custom: by Necessity—When appurtenant: in gross: granted by the Owner of a Limited Estate—Leading Cases—Repair of Way—Extinction of Right—Inclosure Acts—Removal of Obstructions . . . . .	98
---	----



## CHAPTER VII.

PAGE

Rights connected with the flow of Water—To what extent they can be acquired—Rights of the Owner of the Bank of a Stream—Prescription Act—How the Right to a flow of Water will pass—Remedy for Injuries to this Class of Rights—Defilement of Water—Right to Water flowing in a subterraneous Course—Diversion of Water from Wells—Diversion of a Stream for a temporary purpose—Diversion of a Spring at the Head—Where a Stream is said to begin—Diversion of Water by sinking a Well—Artificial Streams . . . . .	107
--	-----

## CHAPTER VIII.

Partnership in Collieries—Definition of the Contract—How a Partnership is formed—Powers of each Partner—Rule as to succession to the Share of a deceased Partner—How a Partnership may be dissolved—Notice thereof—How Equity regards the Rights of Partners <i>inter se</i> —Good Faith required—Remedies at Law and in Equity—Power of each Partner to bind and act for the rest—Liabilities of Partners—Negotiation of Bills and Notes—Commencement of Liability—Notice of Retirement—Mining Partnerships—Distinction between Partnership and mere Joint Ownership of Land—Joint Stock Companies Act . . . . .	126
---	-----

## CHAPTER IX.

The Contract of Hiring between Masters and Colliers—Nature of a Contract—The Consideration—Express and Implied Contracts—Competency to enter into Contracts—Contracts by Agents—Relation of Principal and Agent—The Contract of Hiring—General Hiring—Customs—Contract Books—Form of a Contract—The Case of a new Collier without express Agreement—How the Contract may be put an end to—Stoppages of Work—Mutuality—Effect of Misconduct on the claim to Wages . . . . .	136
--	-----

## CHAPTER X.

	PAGE
Disputes between Masters and Colliers—The Employer and Workman's Act, 1875—Remarks on its Scope, Object, and the Jurisdiction conferred—Procedure—Conspiracy Act, 1875 . . . . .	154

## CHAPTER XI.

The Rating of Collieries—Union Assessment Act—Occupiers—Beneficial Occupation—Basis of Valuation—Methods of Valuation—Decisions of the Courts—Improved Value—Definitions of Rent—Adjustment of Royalty—Legal Deductions from Gross Estimated Value—Form of a Valuation—Nature of a Royalty—Brickfields—Summary of Rating Law—Collieries not worked—Coal and Shaft in different Parishes—Coal under the Sea—Way-Leaves—Duties of Overseers—Local Customs	159
---	-----

## CHAPTER XII.

Injuries from Mining—Division of subject—Subjacent Support—Adjacent Support—Definition of adjacent Lands—Modern and ancient Buildings—Acquired Right of Support—Houses built over twenty years—Support where Title involved—Excavations under enclosed Commons—Custom—Summary of Law . . . . .	195
--	-----

## CHAPTER XIII.

Inundations and Barriers—Leading Cases—Escape of Water: consequential damage—Vis major—Water discharged into neighbouring Mine . . . . .	216
--	-----

## CHAPTER XIV.

Working out of Bounds—Damages for Trespass—Harsher and Milder Rules—Summary of Rules as to Damages—Fault as Boundary—Trespass treated criminally—Statute of Limitations . . . . .	233
---	-----

## CHAPTER XV.

PAGE

Coals lying under Railways and Canals—Reference to Railways Clauses Consolidation Act—Clauses affecting conveyance of Lands containing Minerals—Relation created by these Clauses between the Company and the Owner of the Minerals subjacent—Right of Support for the Surface of the Railway—Effect of Notice under Sect. 78—Judgment in Cases on the Sections referred to—Distinction between a Statutable and Common Law Conveyance to a Railway Company as to the Right of Support—Minerals under Canals . . . . .	243
--	-----

## CHAPTER XVI.

Accidents in Collieries—Liabilities of Employers for Acts of Workman and Contractor—Act must be incidental to Employment—Doctrine of Common Employment—Qualifications of Rule before Employers' Liability Act, 1880—Employers' Liability Act, 1880, with Notes to the Sections—Lord Campbell's Act . . . . .	257
--	-----

## CHAPTER XVII.

Manslaughter—Cases on the subject—Fall of a Truck into a Shaft—Acts of Omission and Commission—The Negligence must be Personal . . . . .	280
--	-----

## CHAPTER XVIII.

Truck—Provisions of the Act 1 & 2 Will. IV. c. xxxvii.—Decisions upon the Act—Who are protected by the Act—Cases upon Stoppages from Wages . . . . .	286
--	-----

## CHAPTER XIX.

Conspiracy—Molestation and Strikes—The Conspiracy Act, 1875—Provisions thereof—Procedure thereunder—Strikes . . . . .	297
---	-----

## CHAPTER XX.

PAGE

Criminal Statutes relating to Collieries—The Criminal Law Consolidation Act—Provisions of this Statute—Stealing Coal from any Mine, Vein, &c.—Setting Fire to Mines of Coal—Drowning Mines with intent to destroy or damage—Pulling down, stopping or obstructing Airways, &c.—Destroying, damaging with intent to destroy, Engines, Machinery, &c. . . . .	302
---	-----

## CHAPTER XXI.

Coal Mines Regulation Act—35 & 36 Vict. c. lxxvi., set out in full with Notes to Sections . . . . .	306
---	-----

## APPENDIX.

1. Lease of a Colliery . . . . .	385
2. Lease of a Colliery in the North of England, with Schedules . . . . .	395
3. Lease of Coal in a settled Estate under 19 & 20 Vict. c. cxx., let by the Acre . . . . .	412
4. Lease of a Way-Leave . . . . .	415
5. Miscellaneous Covenants and Provisions taken from various Mineral Leases . . . . .	418

## TABLE OF CASES.

	PAGE		PAGE
A.		Broadbent v. Wilkes	9
ABINGER (LORD) v. Ashton	61	Brooksbank v. Smith	242
Acton v. Blundell	110, 223	Brough v. Homfray	351
Archer v. James	293; 294	Brown v. Robins	198, 200
Arkwright v. Gell	121	Buccleuch (Duke of) v.	
Ashton v. Stock	235	Wakefield	210
Aspden v. Austin	147	Buchanan v. Andrew	209, 210
Attorney-General v. Tomline	6	Bury v. Allen	130
		Bute (Marquis of) v.	
		Thompson	52
B.		C.	
BAILEY, ex p.	150	CALEDONIAN CANAL Co. v.	
Baird v. Williamson	224, 226	Sprot	248, 253
Baker v. Carter	362	Chapman v. Day	213
Barclay, ex p.	81	Chasemore v. Richards	116
Barnes v. Mawson	2, 17	Cheetham v. Williamson	39, 69
Bateson v. Green	12	Chowner v. Cummings	293
Bealy v. Shaw	108, 109	Clarke v. Holmes	262
Bell v. Love	202, 209, 210	Clarkson v. Musgrave	276
Bidder v. North Stafford-		Clegg v. Dearden	217, 218
shire Railway Co.	103	Climie v. Wood	90
Birmingham (Mayor of) v.		Clive v. Foy	173
Allen	199	Co. Lit.	14, 21
Blackett v. Bradley	10, 209, 212	Congleton (Mayor of) v.	
Blyth v. Birmingham		Pattison	63
Waterworks Co.	262	Coombs v. Beaumont	87
Bonomi v. Backhouse	197, 198	Corporation of Lincoln v.	
Bourne v. Taylor	4	Overseers, &c.	164
Bower v. Peate	258	Cox v. Hickman	128
Boyd v. Shorrocks	89		
Bradburn v. Morris	104		

	PAGE		PAGE
Cox v. Great Western Rail- way Co.	269	G.	
Crompton v. Lea	232	GIBBS v. Great Western Railway Co.	270
Culling v. Tufnell	91	Gill v. Dickinson	11, 211, 212
Cutts v. Ward	294, 296	Goold v. Great Western Deep Coal Co.	31
D.		Great Western Railway Co. v. Bennett	251
DALTON v. Angus	79, 200	Green v. Sparrow	54
Dand v. Kingscote	103	Griffiths v. Earl of Dudley	268
Davies v. Treharne v. Sheppard	203 238	Guest v. East Dean	169, 178
Degg v. Midland Railway Co.	261	H.	
Denys v. Shuckburgh	21, 241	HALY v. Hammerley	91
Doe d. Morgan v. Powell	39	Hanson v. Bootham	49
Hanley v. Wood	39	Harris v. Ryding	62
Wood v. Clark	41	Haward v. Banks	221
Bryan v. Banks	42	Heaven v. Pender	262
Morecroft v. Meux	43	Hellawill v. Eastwood	87
Doughty v. Firbank	270	Hemingsway v. Ferguson	64
Dudden v. Guardians Clut- ton, &c.	116	Heske v. Samuelson	266
Dudley Canal Co. v. Graze- brook	248	Hext v. Gill	6
Dudley (Lord) v. Ward	83	Highman v. Wright	364
Duke of Portland v. Hill	7	Hilton's case	285
Durham, &c. Railway Co. v. Wawm	21	Hilton v. Woods	234, 235
Dynen v. Leach	261, 266	v. Granville	9, 209
E.		Hole v. Sittingbourne Rail- way Co.	258
EARDLEY v. Granville	8	Humphreys v. Brogden	196, 197
Ecclesiastical Commissioners v. North Eastern Railway	235	Hunt v. Peate	200
Elmhirst v. Spencer	109	I.	
Elwes v. Mawe	84, 91	INGRAM v. Barnes	290
Embrey v. Owen	115	J.	
F.		JAMES v. Cochrane	50, 55
FAWCETT v. Cash	141	Jegon v. Vivian	61, 235
Fletcher v. Smith	227	Jones v. Mersey Docks, &c.	164
Fletcher v. Great Western Railway Co.	250	Jones v. Shears	50
Floyd v. Weaver	290	Jowett v. Spencer	53
Foley v. Addenbroke	92		

K.	PAGE	P.	PAGE
KEEN v. Millwall Dock Co.	274	PAPILLON v. Branton	67
Keyse v. Powell	237	Penton v. Robart	91
Kitson v. Guardians Lis-		Phillips v. Fothergill	106
keard Union	163	v. Homfray	106
		v. Jones	51
L.		Pillar v. Llynvi Co.	295
LAWTON v. Lawton	83, 91	Pooley v. Driver	126
Lawton v. Salmon	83	Portland (Duke of) v. Hill	7
Lewis v. Branthwaite	6	Prentice v. Hall	319
Lewis v. Fothergill	57	Priestley v. Fowler	261, 265
Livingstone v. Rawyards			
	233, 236	Q.	
Llynvi Co. v. Brogden	235	QUARRINGTON v. Arthur	55
		Quilter v. Mapleson	48
M.			
MARTIN v. Porter	235	R.	
Mason v. Hill	108, 109	RAMEGHUR PERSHAEL v.	
Mather v. Fraser	89	Koong, &c.	125
Mayor of Birmingham v.		Reg. v. Attwood	174
Allen	199	v. Bedworth	165
Mellers v. Devonshire	53	v. Bell	190
Meux v. Jacob	92	v. Bennett	282
Midland Railway Co. v.		v. Everett	184, 188
Checkley	256	v. Haines	281
Millard v. Kelly	292	v. Haslam	174
Millet v. Davey	22	v. Hickman	239, 240
Minshull v. Lloyd	85	v. Hughes	281
Mitchell v. Crasweller	259	v. Joliffe	190
Mitchell v. Darley Main Co.	242	v. Lloyd	149
v. Houldsworth	267	v. Lowe	283
Morgan v. Vale of Neath		v. Parnell	301
Railway Co.	262	v. Parrott	165
Morris v. Smith	51	v. Spon Lane Co.	343
Moyle v. Jenkins	274	v. Tremayne	163
Munday v. Rutland		v. Trent, &c., Co.	162
	204—206, 215	v. Wells	171
Murgatroyd v. Robinson	119	v. Westbrook	184
Musket v. Hill	41	Roberts v. Davey	42
		v. Haines	207
N.		Rowbotham v. Wilson, 11,	208,
NEATH & Brecon Railway			209, 210
Co., ex p.	246	Rylands v. Fletcher	225
Nichols v. Marsland	226		

	PAGE
S.	
<b>SAMPSON v. Hoddinott</b>	115
<b>Saunders, Williams</b>	101
<b>Seahouse v. Christian</b>	103
<b>Seaman v. Vaudrey</b>	3
<b>Shaffers v. The General Navigation Co.</b>	268, 271
<b>Sleeman v. Burratt</b>	290
<b>v. Todd</b>	292
<b>Smith's Leading Cases</b>	64, 84
<b>Smith v. Darby</b>	203
<b>v. Great Western Railway Co.</b>	252
<b>v. Kenrick</b>	119, 218, 224, 226
<b>v. L. &amp; S. W. Railway Co.</b>	262
<b>v. Walters</b>	295
<b>Spon Lane Colliery Co. v. Baker</b>	343
<b>Stephens, ex p. re Lavies</b>	85, 87
<b>Stevens v. Woodward</b>	258
<b>Stone v. Hyde</b>	277
<b>Storey v. Ashton</b>	259
<b>Sutcliffe v. Booth</b>	125

	PAGE
T.	
TAYLOR v. Cameron	88
v. Whitehead	104
Trotter v. Maclean	235, 236 242
W.	
WEST CUMBERLAND, &c., Co. v. Kenyon	229
Wheatley v. West Brymbo Coal Co.	54
White's case	105
Whitehead v. Holdsworth	320
Whitehouse v. Wolver- hampton Railway Co.	246
Wilkinson v. Proud	2
Williams v. Groucourt	18
Williamson v. Taylor	147
Wilson v. Merry	261
v. Cookson	295
Wood v. Morewood	234, 235
Wright v. Williams	110
Wyatt v. Hutchinson	200
Wynne v. Forrester	362, 364
Wyrley Coal Co. v. Bradley	248



# TABLE OF STATUTES REFERRED TO.

	PAGE		PAGE
32 Henry VIII. c. 28	25	23 & 24 Vict. c. 38	48
34 Henry VIII. c. 34	65	24 & 25 Vict. c. 97	302—305
43 Eliz. c. 2	159	25 & 26 Vict. c. 89	134
29 Car. II. c. 3	24, 66, 137		c. 103 193
4 Geo. II. c. 28	44	27 & 28 Vict. c. 95	279
11 Geo. II. c. 19	73	28 & 29 Vict. c. 86	128
1 & 2 Will. IV. c. 37	286—291	31 & 32 Vict. c. 122	190
2 & 3 Will. IV. c. 71	13, 78,	32 & 33 Vict. c. 41	193
	79, 80, 99, 107, 122, 124		c. 71 96
3 & 4 Will. IV. c. 27	4	33 & 34 Vict. c. 97	74, 75
6 & 7 Will. IV. c. 96	161, 193	35 & 36 Vict. c. 76	138
4 & 5 Vict. c. 35	11		306—380
5 & 6 Vict. c. 108	27	37 & 38 Vict. c. 57	4
8 Vict. c. 20	243—249		c. 90 154
8 & 9 Vict. c. 116	24	38 & 39 Vict. c. 86	157,
	c. 118 14, 15		297—299
9 & 10 Vict. c. 93	279	41 & 42 Vict. c. 31	90, 96
15 & 16 Vict. c. 51	11	43 & 44 Vict. c. 42	263—279
	c. 76 73	44 & 45 Vict. c. 41	46—48
21 & 22 Vict. c. 57	27	45 & 46 Vict. c. 38	26, 27
	c. 94 4		c. 43 97
22 & 23 Vict. c. 35	45	46 & 47 Vict. c. 52, 96, 133, 134	
	c. 43 15, 207, 209		

## ADDENDA ET CORRIGENDA.

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- Page 6, line 11, *for* 1 L. R. 7 ch. 699, *read* L. R. 7 Ch. App. 699.
- „ „ „ 12, *for* L. R. 5 ch. div. 750, *read* 5 Ch. Div. 750.
- „ 24, *for* 21 Car. II. c. iii., *read* 29 Car. II. c. iii.
- „ 26, line 16, *for* ss. 6-7, 8-9, *read* ss. 6-11.
- „ 48, *for* 9 ch. d. 803, *read* 9 Ch. D. 803.
- „ 106, *add*, As to damages for air-leave, the Court, in the above case, refused an inquiry. The Court also refused such damages in *Jegon v. Vivian*, 6 Ch. App. 742, and in *Livingstone v. Rawyards*, 5 App. Ca. 25. In fact the law as to the assessment of damages for air-leave is by no means clear, but it is submitted that where there is a clear intentional trespass, taken advantage of for ventilation purposes, the trespasser will be held liable in damages for air-leave, as well as for the coal wrongfully taken away.
- „ 143, *for* Master and Servants Act, *read* Employers and Workmen Act, 1875.
- „ 153, *add*, By the Bankruptcy Act, 1883, s. 40, subs. 1 (c), all wages of a labourer or workman not exceeding £50, for services during four months before the date of the receiving order, are made a preferential claim.
- „ 185, *for* R. v. Everett, *read* R. v. Everist.
- „ 188, *for* R. v. Everest, *read* R. v. Everist.
- „ 200, *for* Dalton v. Angers, *read* Dalton v. Angus.
- „ 211, *Bell v. Love* affirmed on appeal, 32 W. R. 725.
- „ 233, *for* 5 App. 39, *read* 5 App. Ca. 39.
- „ 235, *for* Asleton v. Stock, *read* Ashton v. Stock.
- „ „ *for* Llynvi v. Brogden, L. R. 4 Eq. 188, *read* Llynvi v. Brogden, L. R. 11 Eq. 188.
- „ 270, The Decision of the Court of Appeal in *Gibbs v. Great Western Railway Company* is now reported (12 Q. B. D. 208, 50 L. T. Rep. 7).
- „ 299, line 9, *for* xxxvi., *read* lxxxvi.
- „ 351, commence the last paragraph with: “In *Hall v. Hopwood*, 41 L. T. R. 797, a certified manager,” &c.
- „ 359, *add*, after the word “Act” in the last line, *Frecheville v. Souden*, 48 L. T. R. 612.

# COLLIERIES AND COLLIERS.

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## CHAPTER I.

### THE PROPERTY IN COAL.

It is a general maxim of the common law, that whatever is in a direct line between the surface of any land and the centre of the earth belongs to the owner of the surface. Hence the owner of freehold lands has a right to all the minerals underneath the surface, with the exception of royal mines, which it is needless to refer to further, as the royal prerogative does not clash with the property in coal.

This general rule, however, is capable of being modified by showing a title distinct from that to the surface. It is well known that in mineral districts the ownership of the surface is often vested in one person, and that of the minerals in another. Even one seam of coal under the same surface may belong to one person, and another seam to another. Such a claim to minerals, being adverse to the owner of the surface, must be proved distinctly, when called

in question, either by the production of direct conveyances, or, in the absence of documentary evidence, by proof of acts of ownership and length of possession. But the mere reputation of ownership is not sufficient to rebut the presumption of law in favour of the owner of the surface. It must be accompanied with uniform usage and exercise of the right. But a right of this kind cannot be acquired by prescription, which is applicable only to incorporeal hereditaments. Prescription can confer the right to work minerals, but does not constitute the right of property in the minerals themselves, which are part of the land itself. The case of *Wilkinson v. Proud* (11 M. & W. 33) 27 L. J. Ex. 227, clearly marks this distinction. It decided that the right to a given substratum of coal lying under a close is a right to land, and cannot be claimed by prescription, though a right to take the coal is different. In that case Mr. Baron Parke said: "The claim set up is a prescriptive right not to take coal in the plaintiff's close, but to part of the soil itself, viz. a given substratum of coal lying under the close, which does not lie in grant, and cannot be claimed by prescription." These acts of ownership must be distinct from those over the surface, in order to support the right to a freehold. But they need not always be exercised in the identical lands that are in question, provided those lands can be shown to be within the operation of a custom prevailing over an ascertained district. The case of *Barnes v. Mawson* (1 Maule & Selwyn, 77) supplies an illustration of this point. It was an action of trover for coals. The question was, whether the lord of a manor was entitled to the

coals under a certain freehold tenement within the manor. He was allowed to show by parol evidence that there was a known distinction within the manor between the "old land" and the "new land," and that the plaintiff's land lay within the boundary of the new land; and also to show by evidence of general reputation and acts of taking coal under the lands of other freeholders within the same boundary, that the right to the coals under the plaintiff's land was in the lord.

When the right to the minerals is vested in a person not entitled to the surface, and there has been no adverse possession or establishment of title on the part of any other persons by acts of ownership, the right of possession will be held to continue in the original owner; and no presumption of waiver or grant will arise from the non-user of the right in favour of the owner of the surface. It has been said that there are many cases where, from non-user of a right, an inference of abandonment might fairly be made; but that does not apply to such a case as this. It is not generally true that the owner of mines works every mine which he has a right to work, and therefore the relinquishment of the right cannot be presumed from the non-exercise of it. It is well known that mines remain unwrought for generations, and that they are frequently purchased or reserved, not only without any view to immediate working, but for the express purpose of keeping them unwrought until other mines should be exhausted, which might not be for a long period of time.\*

\* *Seaman v. Vandrey*, 16 Ves. 390.

The Statute of Limitations, 3 & 4 Will. IV. c. xxvii., does not apply to the mere absence of the exercise of rights of possession by the real owner of mines, but to the adverse possession of others. By this statute the doctrine of non-adverse possession is done away, except in cases provided for by sect. 15; and an ejectment must be brought within 20 years after the original right of entry of the plaintiff (or of the party under whom he claims) unless the tenancy is created by deed. If the tenancy is for a term created by deed not yet expired, the Statute of Limitations has no application, and the landlord's right to re-enter subsists for the whole length of the term. By 37 & 38 Vict. c. 57, the time is reduced to 12 years.

#### RIGHT TO MINERALS IN COPYHOLD LANDS.

As the copyholder has now acquired by Act of Parliament, 21 & 22 Vict. c. xciv., an estate of inheritance in his lands by the process of enfranchisement which he is empowered to effect, the peculiar rights with regard to minerals arising out of this tenure are becoming of less importance. The copyhold tenure is said to be derived from the ancient system of villenage, by which low tenure parts of the demesne lands of lords of manors were held under the feudal system. The villeins held small portions of land at the will of the lord, who might dispossess them whenever he pleased. But the villeins in process of time gained considerable privileges from their lords. For the latter having in many places, time out of mind, permitted their villeins and their children to enjoy their possessions

without interruption, in a regular course of descent, the common law, of which custom is the life, gave them title to prescribe against their lords, and on performance of the customary services to hold their lands in spite of any determination of the lord's will. For though they were said to hold their estates at the will of the lord, yet that is such a will as is agreeable to the custom of the manor, of which the rolls of the manor courts were evidence. And as such tenants had nothing to show for their estates but these rolls, or copies of such entries witnessed by the steward, they were called "tenants by copy of court roll," and their tenure itself a "copyhold."

In the absence of any special custom the general rule seems to be that the right of property in minerals lying on or under land held by this tenure belongs to the lord, while only a possessory interest is vested in the tenant. But neither the lord without the consent of the tenant, nor the tenant without the licence of the lord, may open and work new mines. In his *Treatise on Tenures*, Lord Chief Baron Gilbert says, p. 327: "It seems to me that a copyholder of inheritance cannot, without a special custom, dig for mines, neither can the lord dig in the copyholder's lands, for the great prejudice he would do to the copyhold estate." The leading case upon this point is that of *Bourne v. Taylor* (10 East, 189), in which it was distinctly laid down that the lord of a manor, as such, has no right, without a special custom, to enter upon the copyholds within his manor, under which there are mines and veins of coal, in order to bore for and work the same; and the copyholder may maintain an action of trespass

for so doing. This case was followed by another, *Lewis v. Branthwaite* (2 Barn. & Ad. 437), in which it was decided that, as in copyhold lands, though the property in mines is in the lord, while the possession of them is in the tenant, the latter may maintain an action of trespass against the owner of an adjoining colliery for breaking and entering the subsoil and taking coal therein, though no trespass be committed on the surface.

This doctrine has been repeated in *Hext v. Gill* (1 L. R. 7 ch. 669) and *Attorney-General v. Tomline* (L. R. 5 ch.: div. 750). "There is nothing," said Lord Justice Mellish, "to be got out of the soil and sold for a profit which the copyhold tenant, in the absence of some special custom, is entitled to get without the permission of the lord; the property of it is in the lord, though it is true that in the absence of special custom the lord cannot get it without the licence of the tenant." And Lord Justice Fry said: "That case affirms the two propositions, that the lord of the manor is, in the absence of custom, entitled to all the minerals, and that the word 'minerals' included every substance which can be got from underneath the surface of the earth for the purpose of profit."

In the latter case the lord had entered without permission on the land of a copyhold tenant (in which manor there was no custom authorising him to do so) and dug for and carried away minerals. The copyholder, though only a reversioner, was held to be entitled to an injunction, and the measure of damages was the gross amount produced by the sale of the minerals, less the expenses of working and such a sum



by way of profit as would have induced a stranger to undertake the working.

But if the minerals are once severed from the inheritance, whether by the copyhold tenant or by any stranger, the lord will be entitled to recover them in an action of trover. They are no longer part of the freehold, but personal chattels belonging to an owner whose right of possession has accrued. "Custom is the life of all tenures by copy," and custom is in fact the evidence of the terms of the grant of the lord. When a custom exists enabling the lord to work the mines, it must be concluded that the possession of the minerals has been reserved to him. But the custom must not exhaust the whole estate of the copyholder without recompense. There can be no doubt that a general claim by the lord to work mines in customary lands without compensation would be held to be invalid.\*

With reference to the customary rights of the tenants as to coal, the case of the Duke of Portland *v.* Hill (Law Reports, 2 Equity, p. 765), will be found very valuable. It was laid down that in lands held by copy of court roll according to the custom of the manor the freehold is in the lord, and in the absence of custom (the onus of which lies upon the tenant) the tenant has no right to work the minerals. The existence of a "customary," compiled within the period of legal memory, is conclusive evidence against the existence of a custom not mentioned therein. Such a custom recognised the right in the tenants to dig coal for their own uses. Other documents showed that

\* Bainbridge on Mines, 20.

the privilege of digging coal for their own use had been enjoyed by the tenants under the waste, but not under their customary inclosures. There was also evidence of tenants having, during a long period, dug coal in their customary inclosures for sale. It was held by Vice-Chancellor Wood that the custom was restricted to digging in the waste for coal for the tenants' own consumption, and that they had no right of digging under their customary inclosures. In the judgment will be found a vast body of learning on this subject which may be referred to with great advantage when a dispute on this subject matter occurs.

The following recent case shows the sharp limitations of the right to convey minerals under or over copyhold land, when they are got within the manor. It is that of *Eardley v. Granville* (3, Chancery D. 326). It was a Crown Manor, and the Crown and its lessees were by custom entitled to enter on the lands for the purpose of working the minerals. The Defendant was lessee of a mine outside the manor and also of some Crown mines within it. He claimed a right to use a "Crut" or underground way beneath the land of the Plaintiffs, who were copyholders. The Defendant sought to convey minerals from the outside mine (S) to the deep pit by which the manorial mines were worked, and thence by a branch railway made by the Defendant over part of the same copyhold to the main line. But it was held that such was a trespass, in the absence of any proof of acquiescence on the part of the Plaintiffs or their predecessors in title, and the Defendant even restrained from carrying the outside or "S" minerals over or under their copyhold land.

In the course of the argument and in the judgment, it was laid down in accord with previous cases that in an ordinary copyhold manor the estate of the copyholder is *in the soil throughout, except as regards trees, mines and minerals*, the property in which remains in the lord. When the lord has removed minerals the space left belongs to the copyholder. And the right of the lord is not like that of a seller of freehold who had reserved mines, and remains the owner of the vacant space.

It has also been decided in the case of *Hilton v. Lord Granville* (5 Q. B. 701, and 13 Law Journal, Q. B. 193), that a prescription in the manor of Newcastle-upon-Tyne for the occupiers or licensees of the collieries situate within that manor to work them under any messuages, dwelling houses, buildings, and lands, part of the said manor, and to dig and make underground all such pits, shafts, &c., under the said messuages, &c., as might be necessary for that purpose, and out of the mines to get the coals and carry them away, doing no more than necessary for the purpose, and paying to the occupiers of the surface of any lands damaged a reasonable compensation for the user of the surface of such lands, for damage done to the surface in working the collieries, but without making compensation for damage occasioned to any messuages, &c., *is unreasonable*, and cannot be sustained in law. A similar claim by custom is also invalid. The custom and prescription are equally invalid, whether claimed in respect of copyhold or freehold houses.

After referring to the case of *Broadbent v. Wilkes* (Wilkes Rep. 360), where a somewhat similar custom

had been set up, Lord Denman, in delivering judgment, said, "There can be no necessity for showing by a comparison of details that the custom now pleaded is far more oppressive than that which was thus deliberately condemned. The words 'at the will of the lord' do not, indeed, appear in the present record; but such is the effect of the claim, for the lessee of the duchy and his sub-tenants assume the power of entering into any lands within the manor, and searching for minerals, without any restriction as to time and season, or the mode of occupation or culture. Whatever the lord can reasonably be supposed to have reserved out of his grant, *consistently with that grant*, the usage may adequately prove that he did reserve it. But a claim *destructive of* the subject matter cannot be set up by him; and if the grant could be produced, reserving a right in the lord to deprive his grantee of the enjoyment of the thing granted, such a claim must be rejected as repugnant and absurd. That this prescription or custom has this destructive effect, and so is repugnant and void, appears to us too clear to admit of any illustration by argument." But see further as to this case hereafter.

And a custom for a lord to dig mines under the waste, without leaving any support to the surface or making any satisfaction for the injury done, is bad. It is no defence to say that he has been accustomed for twenty or forty years to dig under other people's land in the same manner without making any compensation. This was decided in the case of *Blackett v. Bradley* (31 Law J., Q. B. 65); and the Lord Chief Justice observed that the case of *Hilton v. Granville*,

above referred to, has been much shaken in authority, as one of the positions assumed in the reasoning of the Court has been since overruled in the House of Lords, in the case of *Rowbotham v. Wilson* (6 E. & B. 593 ; 8 E. & B. 123). In *Gill v. Dickinson* (5 Q. B. D. 161), the Court of Q. B. Div. refused to follow *Blackett v. Bradley* for reasons given in a case upon the same Inclosure Act.

In the Acts for the enfranchisement of Copyhold Lands, 4 & 5 Vict. xxxv., and 15 & 16 Vict. li., provision is made for securing and settling the mineral rights. By the last statute it is enacted that no enfranchisement shall affect the mineral rights of the lords of manors, or any tenants, without their express consent in writing.

#### RIGHT TO MINERALS IN COMMONS.

The right of common is the right of taking a profit in the land of another in common with others. *Primâ facie* the lord of the manor is entitled to all waste lands within the manor, and it is not essential, in order to support this *primâ facie* title, that he should show acts of ownership of such lands. And by the presumption of law the exclusive property in the soil of all common and waste lands of the manor is vested in the lord. Consequently, the right of property in all the minerals in such lands is in him. The commoner has no interest in the soil of the land on which he has a right of common. The right of the lord to the soil of the common lands, in the absence of custom

or express grant, is so extensive, that it may even be exercised to the destruction of the herbage, and *pro tanto*, to the loss by the commoners of their privileges. In the case of *Bateson v. Green* (5 T. R. 411), it was held that the right of commoners in a common may be subservient to the right of the lord in the soil ; so that the lord may dig clay pits there, or empower others to do so, without leaving sufficient herbage for the commoners, if such a right can be proved to have been always exercised by the lord. “There is a clear distinction,” says a learned author,\* “between copyhold lands in which the tenant has the possession, and common lands where the right of possession is wholly vested in the lord. In copyhold lands he claims the right of property in mines as part of his freehold inheritance ; but he claims the right to work them by prescription, as they are in the possession of others. In common lands he has never lost possession of any part, and that possession, once absolute, is still sufficient to secure to him the full benefit of his first rights. The right of the commoner to the surface is thus subservient to the right of the lord to take the minerals, but the exercise of that right must be *bonâ fide* and without malice.

“A prescriptive or an actual possessory title, which gives the right to the minerals of a common to the commoners, must, as in other similar cases, be evidenced by distinct acts of ownership.”

Where the lord of the manor has stood by for a long period and allowed the tenants to work the mines, and expend large sums of money, the Courts

\* Bainbridge on Mines, 24.

of Equity will not give him an injunction or account against the tenants, but will leave him to his legal remedy. And it is presumed that the lord may lose his claim altogether to any part of the surface or soil of a common by allowing his title to be ignored and not acknowledged by others. If a stranger, for instance, enters upon a common and there works the minerals without dispute or acknowledgment, he would in due course of time secure a title to work them by prescription, both against the lord and the commoners. The lord may also part with his rights and profits in the common for a valuable consideration, by his own express act. Thus, it appears that the right to the minerals of a common may be vested either in the lord by presumption of law, or in the commoners themselves by prescription, founded on custom or on acts of ownership; or in strangers by express grant, or by sufficient acts of ownership in the nature of encroachments. By the 2 & 3 Will. IV. c. lxxi. s. 1, it is enacted, that "Claims to right of common, profits à prendre, and other profits (except tithes, rents, and services), shall not be defeated after thirty years' enjoyment, by showing only that such right was first enjoyed prior to that period; and after sixty years the right shall be absolute, unless it appear that the same was enjoyed by consent or some agreement.

But even when the rights of the lord are not disputed, they may still co-exist with a claim on the part of the commoners to take the minerals. For Lord Coke says, "There be divers other commons, as of estovers, of turbary, of piscary, of digging for

coals, minerals, and the like.”\* But in such cases as admitted claims on the part of the commoners to dig for coals or minerals, there must, by analogy to other similar rights, be some stint and restriction to the exercise of this right. This point is, however, a very obscure one, and no case has yet been decided which indicates the opinion of the courts on restriction in digging for minerals.

When common lands are inclosed, and no special provision is made to the contrary, the allotments are freehold; but a provision is almost universally made that the allotments shall follow the nature of the tenure of the land in respect of which they are made. If the minerals are not expressly mentioned, it would seem that the several owners will be interested in them according to the nature of the tenure.

In the Act for facilitating the inclosure, exchange, and division of common lands, 8 & 9 Vict. c. cxviii. s. 97, it is enacted, that when part of the land to be inclosed shall be converted into a regulated pasture, and the residue shall be allotted in severalty, it shall be lawful for the valuer, having regard to the right of the lord of the manor, as it shall have been ascertained and declared by the provisional order of the Commissioners, and with the consent of the lord of the manor, and a majority in value of the other persons interested; to direct that the rights of the lord of the manor, in and to all or any of the minerals, stone, &c., under such part of the land as shall be converted into regulated pasture shall be reserved to the lord and all the minerals under the residue to be divided and allotted

\* Coke Litt. 122 a.



in severalty, shall become the property of the owners of the respective allotments.

Sect. 98 enacts, that where the right to the minerals under any land inclosed under this Act shall exist as property distinct and separate from the property on the surface, and shall not be compensated for upon the inclosure, such right, and all auxiliary rights and easements, shall not be affected by the inclosure; and, if the minerals under land so inclosed have been leased as property distinct from the property on the surface, the rights of the lessee shall not be affected by the inclosure.

And by the late Act, 22 & 23 Vict. c. xliii. s. 1, it is enacted, that on any inclosure where the minerals are reserved to the lord or other person, the provisional order must in future specify whether a right to enter the lands to work minerals is to be reserved, and whether any compensation is to be made for damage to the surface. By sect. 2, the lord, or such other person, and the other interested parties, may agree by what persons such compensation to the allottees, whose surface may be damaged, shall be made, and such agreement is to be part of the award. By sect. 3, when by the provisional order the minerals are reserved to the lord, or such other person, with a right to enter the enclosed lands to work the minerals, it shall be lawful for the lord or such person to do all that is necessary and convenient for that end. By sect. 4, when the compensation is to be made by the owners of the allotments collectively, with or without the lord, or such person, the damages are to be assessed and enforced by two justices in the manner indicated by sects. 5 and 6.

## MANORS.

The right to minerals being sometimes connected with manorial rights, a slight sketch of the latter may be conveniently inserted in this place. The present English manor derives its origin from the feudal system. A manor seems to have been a district of ground held by a lord or great personage who kept to himself such parts of it as were necessary for his own use, which were called demesne lands, and distributed the rest to freehold tenants, to be held of him in perpetuity. Of the demesne lands, again, part was retained in the hands of the lord, for the purposes of his family; other portions were held in villenage, and the residue being uncultivated, was termed the lord's waste, and served for public roads, and for common of pasture for the lord and his tenants. Villenage subsequently, and by gradual steps, as we have seen, was developed into copyhold tenure, commonly so called, or tenure by copy of court roll, at the will of the lord, according to the custom of the manor. The mineral rights in relation to this particular tenure have already been considered. But the term copyhold is taken, in its largest sense, to include two other varieties of tenure, namely, ancient demesne and customary freehold. Ancient demesne partakes of the baseness of villenage in the nature of services, but also of the freedom of socage in their certainty. Manors in ancient demesne, though now mostly in the hands of subjects, were part of the royal domain at the time of the Conquest. The tenants in ancient demesne possess certain customary privileges, supposed

by Lord Coke to be derived from the indulgence of the crown in matters pertaining to the king's husbandry. In this tenure the freehold is not in the lord, but in the tenant, and it follows that in the absence of special custom, prescription, or express conveyance, the right to the minerals will be in the tenant.

The other variety of the tenure is called "customary freehold," and exists in many parts of the kingdom. The evidence of title is to be found upon the court rolls, and the entries declare the holding to be according to the custom of the manor; but it is not said to be at the will of the lord. Persons holding by this tenure are called "customary freeholders," yet here the freehold is in the lord, and the timber and minerals belong to him and not to the tenant. The customs of these manors are subject to great variety, but for the most part the incidents of customary freehold are similar to those of ordinary copyhold.

The existence of a manor is proved by the production of the ancient muniments of the manor, the court rolls, the exercise of manorial rights, and by reputation. Reputation is also admissible to prove the boundaries of a manor. In actions by or against the lord of a manor, the right usually depends on proof of the particular custom of the manor, and of the actual enjoyment of that which is claimed by or against the lord. The case of *Barnes v. Mawson* (which shows how far evidence of reputation may be carried on a question whether the lord of a manor was entitled to the coals under a freehold tenancy within the manor) has been referred to under the

head of "Property in Coal" at the beginning of this work.

#### THE RIGHT TO WORK MINERALS.

##### 1. *When the Owner does not hold the Surface.*

We have next to consider in what cases the proprietor of coal strata is entitled to work them, when the property in them is separated from that of the surface, and forms a distinct inheritance and possession.\* Mineral property in this condition is held either by express grant or exception, or by virtue of acts of ownership which have created a prescriptive right, by lapse of time, against the owners of the surface. In this last case the acts themselves have established the full right to work. It is a general rule that when anything is granted, the means of attaining it, and all the fruits of it (so far as the power and estate of the grantor extends), are also granted.† Thus a grant of minerals involves also the power and right to enter and work them, unless there is some restriction in the grant itself. Any special power will be limited in its duration and consequences by the particular expressions which confer it. In all well-prepared instruments, compensation is provided in such cases for injuries to the surface. But in the absence of such express stipulation, it is presumed that proper compensation would still be recovered, unless any

\* It may be convenient to state that if A., the owner of land, lets B. open a shaft to dig for minerals without any other express stipulation, B. is bound to fence that shaft. (*Williams v. Groucott*, 27 J. P. 693.)

† As to the right to sink through an upper seam, see page 31.

words in the instrument itself could be construed to withhold it.\* Of course a person can only grant what he himself possesses, and, therefore, in the case of minerals under copyhold lands, though the lord may grant the property in those minerals to another, he cannot grant the right of entry to work them.

## *2. Rights of Persons with limited Interests.*

A tenant in tail has an estate of inheritance, to hold to himself and the heirs of his body, or to himself and particular heirs of his body. These tenants in tail, as they have estates of inheritance, are entitled to commit every kind of waste, but this power continues only during the life of the tenant in tail. When it is said that tenants in tail may commit every kind of waste, the meaning is, that they can do those acts to the land which tenants who have not an estate of inheritance cannot legally do. Now, as waste consists, amongst other things, in opening new mines or quarries, it follows that a tenant in tail may do these acts. Tenants in tail, after possibility of issue extinct, are also not impeachable for waste, but, like tenants for life, when their estate is given without impeachment of waste, they may be restrained from wilfully destroying the estate.

A tenant for life, without being authorized, cannot commit waste; but it will be seen in the next chapter that he is now empowered to grant long leases of coal. A mortgagee in fee in possession has a right at law to commit any kind of waste, being then considered as

\* Bainbridge on Mines, 59.

the absolute owner of the inheritance ; but he will be restrained by a Court of Equity, which will direct an account of timber, for instance, cut down, and order it to be applied in reduction of the mortgage debt.

Copyholders cannot, unless there be a special custom to warrant it, commit any kind of waste, and every species of waste not warranted by the custom of the manor, operates as a forfeiture of the copyhold.

Ecclesiastical persons who hold lands in right of a church, are disabled from committing waste, though, like other tenants for life, they have the right to take from the land the materials necessary for repairs. They cannot legally open new mines, but they may work those already open.\* And this distinction between mines already opened and unopened is important in other cases besides that of ecclesiastical persons. Lord Coke says : “ A man hath land in which there is a mine of coals, or the like, and maketh a lease of the land without mentioning any mines, for life or for years ; the lessee for such mines as were open at the time of the lease made, may dig and take the profits thereof. But he cannot dig for any *new* mine that was not open at the time of the lease made, for that should be adjudged waste. And if there be open mines, and the owner make a lease of the land with the mines therein, this shall extend to the open mines only, and not to any hidden mines. But if there be no open mine, but the lease is made of the land together with all mines therein, then the lessee may dig for mines and enjoy the benefit thereof, otherwise

\* As to new but limited power to grant leases, see next chapter.

these words should be void." \* But this last proposition is not now held to be law. There is but little difference in this respect between a tenant for life and for years. Both are now equally punishable for waste, and both may work mines already opened.

But a tenant for life, *without* impeachment of waste, may open and dig mines at his own pleasure, though a Court of Equity would probably interfere if it were shown that he was exercising his privilege in a wanton or malicious manner. For every mining operation is to some extent a destruction of the property, and must be exercised fairly. And the question whether by his settlement he is or is not impeachable for waste, affects the appropriation of rents arising from mineral leases granted by him.

A jointress, tenant for life, is in the same situation as an ordinary tenant for life, and may be with or without impeachment of waste. An estate by the curtesy, and an estate in dower, are also estates for life, and the holders are punishable for waste. Coparceners, joint tenants, and tenants in common, are also liable to each other for waste ; but they may all concur among each other in an act of waste, provided this concurrence includes all.†

Where a mortgaged estate is of an insufficient value to pay the mortgage, a mortgagee, on entering into possession, may open mines and cut timber, and he will be charged only with the net profits. But where the estate is sufficient, a mortgagee in possession has no

\* Co. Litt. 54, b.

† 11 Rep. 49 a ; *Denys v. Shuckburgh*, 4 T. & C. 42 ; *Durham and Sund. Rail. Co. v. Wawn*, 3 Beav. 119.

such right; and if he opens and works mines, he will be charged with gross receipts, and will be disallowed the expenses of working. (*Millet v. Davey*, 31 Beavan, 470.)

The remedies for waste are either by action of trespass, which may be brought by the person in reversion or remainder, for life or for years, as well as in fee; or, secondly, by application to a Court of the Chancery Division, which will then not only direct an account to be taken for the damage done, but will interpose, by way of injunction, to restrain the commission of future waste. Ecclesiastical persons may also be proceeded against for waste. It has been held that an action will lie against them for dilapidations, and may be brought by the successor to a benefice against his predecessor or his representatives.



## CHAPTER II.

### LEASES. AND LICENCES.

THE mineral districts of Great Britain are generally worked under leases or licences, upon the construction and obligations of which disputes very commonly arise. It seems expedient, therefore, to insert in this place a sketch of the nature of the instrument called a lease ; of its form and requisites ; and the rules of construction of the covenants contained in them.

A lease is a contract between parties by which the one conveys any lands or tenements to the other for life, for years, or at will. But it is always necessary that the lands or tenements must be let for a less time than the period for which the lessor has an interest in the property. The relation thus created is generally expressed by the phrase, landlord and tenant. A lease is usually made in consideration of rent, or some other annual recompense, to him who conveys the premises. The lessor, or landlord, has a reversion in the lands, &c., which are let ; that is, after the expiration of the lease the land *reverts* to him. By virtue of this reversion, he has the power of distraining on the land for the rent which is agreed upon.

The ordinary lease is that for a term of years, by which lease, a rent, usually payable in money, at stated times, is reserved.

The words used in a lease for the purpose of conveying that interest in the lands or tenements which constitutes a term of years, are "demise, grant, and to farm let." But none of these words, though usual, are indispensable to the effect of a demise. Any expressions which sufficiently indicate the intention of one of the parties to divest himself of the possession for a determinable period, in favour of the other, are clearly sufficient to constitute a lease. And even the words "agree to let," may be so used as to amount, in construction of law, to an actual demise, and are not necessarily to be expounded as a mere agreement for a lease. The words may run in the form of a licence, or covenant, or an agreement. For a lease for years being simply a contract for the possession and profits of the lands or tenements on one side, and a recompense of rent, or other income, on the other, if the words made use of are sufficient to prove such a contract, in whatever form they are introduced, the law calls in aid the intention of the parties, and models and governs the words accordingly.

By the Act 8 & 9 Vict. c. cvi. s. 3 (passed in 1845), leases required by law to be in writing are made void at law unless they are made by deed.

The Statute of Frauds, 21 Car. II. c. iii., enacts that all leases or terms of years by parol, and not put in writing and signed by the parties so making them, shall have the force and effect of estates at will only;

excepting, nevertheless (sect. 2), all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount to two third parts at least of the full improved value of the thing demised. Yet, notwithstanding the statute, a parol lease for more than three years will create a tenancy from year to year. But a parol letting, to commence on a future day, for three years, is not warranted by the statute. If a landlord lease for seven years by parol (by which is meant a verbal letting, or one in writing, but not under seal, nor in the form prescribed by the statute), though such lease be void by statute as to the duration of the term, the tenant holds under the terms of the lease in other respects, as to the rent, the time when he is to quit, &c.

#### BY WHOM LEASES MAY BE GRANTED.

All persons not under legal disability may grant leases for terms not inconsistent with the nature of their estates, provided they have the actual or constructive possession of the premises, and not a mere right of entry. The term granted in the lease must be for something less in duration than the interest of the person granting it. If made for the whole time it would rather be an assignment.

Tenants in tail may make leases to bind their issue (but not those in remainder or reversion), if a fair and proper rent is reserved, and the other conditions prescribed by the statute 32 Hen. VIII. c. xxviii. are observed. So may a husband seised in right of

his wife, provided she join in the lease by indenture. Such leases must begin from the date of the deed. If there be an old lease, that must first be surrendered, or be within a year of expiring. They must either be for twenty-one years, *or* three lives, or less. They must be of corporeal hereditaments, and of lands, &c., commonly let for the last twenty years past. The usual rent for the last twenty years must be reserved; and these leases cannot be made without impeachment of waste. These are statutable leases.

Leases by tenants in curtesy, dower, or jointure, become void on their death, and the acceptance of rent by the heir does not make the lease good. The lessee continues to be mere tenant by sufferance.

By the Settled Land Act, 1882, ss. 6-7, 8-9, tenants for life may lease the minerals for sixty years, and the rent may be made to be ascertainable by the acreage worked, or by the quantities of mineral gotten, &c., and a minimum rent may be made payable with power to make up deficiencies, in case an amount is not gotten equal to the fixed rent, in any subsequent specified period free of other than such fixed rent.

But if it is made to appear to the Court that it is the custom of the district to lease lands for longer terms or on other conditions than those specified in the Act, or that it is difficult to make leases for such terms and on such conditions, the Court may empower the tenant for life to lease for longer terms, or even in perpetuity secured by such conditions as the Court shall impose.

But under a mining lease, unless a contrary intention

is expressed in the settlement, there must be from time to time set aside part of the rent ; namely, when the tenant for life is impeachable for waste in respect of minerals, three-fourths of the rent, and otherwise one-fourth. Such sums are to be deemed "capital money arising under the Act," which may be applied in various ways under sect. 21.

By sect. 58, other limited owners such as tenants in tail, tenants for the life of another, not holding merely under a lease at a rent, tenants by the curtesy, &c., when the estate of each *is in possession*, shall have the powers of a tenant for life.

Executors and administrators may either assign a term come to their hands, or they may underlet in the same manner as the deceased person they represent might have done. But they must carefully see that they have that power by the will.

Mortgagors and mortgagees cannot make leases to bind each other's interests. Trustees for charities may make leases provided they are beneficial to the objects of the trust, but if otherwise, they may be set aside by a Court of Equity.

As to the power of ecclesiastical persons to grant leases of mines and minerals, two enabling Acts have been passed in the present reign. By the statute 21 & 22 Vict. c. lvii. it is enacted, that if it shall be made to appear to the satisfaction of the Ecclesiastical Commissioners for England and Wales, that all or any part of the lands, mines, minerals, &c., belonging to any ecclesiastical corporation, which are by the statute 5 & 6 Vict. c. cviii. allowed to be leased, might, to the permanent advantage of the estate or

endowments, be leased in any manner, or be sold, or otherwise disposed of, it shall be lawful for any ecclesiastical corporation, aggregate or sole (except as in the previous Act is excepted), with the consents in that Act mentioned, and with the approval of the said Commissioners signified by deed, to lease all or any part of the mines, minerals, &c., belonging to such corporation, whether they may have been previously leased or not, in consideration or partly in consideration of premiums, for such term and on such conditions as the said Commissioners shall think proper.

By the former Act, in the case of a lease by the incumbent of a benefice, the consent of the patron is made necessary, and he must also be a party to the lease.

Every power that can be necessary for making mineral property available to the Church and its lessees, seems to be supplied in these two statutes. The special application of the proceeds is also defined and provided for, but need not be inserted in this treatise.

Leases of lands in copyhold capable of being leased may be granted by the lord of the manor or his steward. But copyholders cannot grant leases for more than a year without licence from the lord, or by special custom, without incurring a forfeiture of their estate. But a lease for a year, and so on during the will of the lessor, is good.

Powers of leasing must be strictly followed. Leases executed by agents in the name of the principal, they having powers by deed for this purpose, are good to all intents and purposes.

As to what may be the subject of leases, it is settled that all corporeal hereditaments may be leased. Tithes and tolls may be leased, and so may rights of common under certain conditions, and also rights of way.

## PARTS OF A LEASE.

A lease by deed usually contains—the premises ; 2, the habendum ; 3, the reddendum ; 4, the covenants ; and, lastly, any proviso, or condition.

The premises contain the name of the lessor and lessee ; the consideration ; a description of the thing demised, in express words, or in such a way that by reference it may be reduced to a certainty ; and the exception or thing excepted, if any. The recitals also (or statements of facts admitted by both parties, which it is thought expedient to record in the deed), are contained in this early part of the lease ; and the date of the instrument, which cannot be post-dated, but may be ante-dated as far back as the parties please. The consideration must be either “good,” as natural affection, or “valuable,” as money and the like. In leases it is commonly the annual rent.

With respect to the description of the thing demised, it may be convenient to state that the word “land” comprehends, in its legal signification, any ground, soil, or earth whatsoever. It legally includes, also, all houses and other buildings ; and any ground which is covered with water. “Land,” also, in its legal meaning, has an indefinite extent upwards as well as downwards. So that it includes, not only the face of the earth, but everything under it or over it. Therefore,

if a man grants all his "lands," he thereby grants all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields. Not but that the particular names of the things are equally sufficient to pass them; but the distinction is this, that by the name of a croft, &c., nothing else will pass but what falls strictly under that term, but by the name of "land" everything terrestrial will pass. The words "more or less" must be confined to a reasonable deviation only from the description.\*

If the thing described be sufficiently ascertained, it is sufficient, though all the particulars are not true. Whatever constitutes the essence of the thing granted, or is part of it, will pass with it, though it be accidentally severed at the time of the lease.

When *all* the minerals within certain lands are the subject matter of the lease, no dispute can well arise, except with respect to boundaries. But in some cases only particular strata or deposits are demised. In the case of coal there is much less difficulty than in that of metalliferous veins. Yet it sometimes happens that the stratification is disturbed. An upper stratum of coal may be depressed so as apparently to correspond with a lower stratum; and the lower but adjacent strata may in their character closely resemble the upper one. The utmost care, therefore, should be taken in a lease to render the description as clear and intelligible and accurate as possible.

After describing the subject matter, the lease usually proceeds to grant full liberty to work the mines. It is true that the right to work mines is necessarily incident

\* Step. Black, i. 158.



to the grant without any express authority for that purpose, but it is always preferable to leave no room for dispute. In the case of *Goold v. The Great Western Deep Coal Company* (29 J. P. 820 ; 11 Jurist N. S. 865), it appeared that an upper seam of coal was leased to A. with the reservation of the right to lease the underlying seams to other parties, to be worked so as not to impede or injure the working of the upper veins. It was held that the right was thereby impliedly reserved to open a shaft through the upper seam, for the purpose of working the lower seam, and that the restriction upon the mode of working applied only to the seam when reached, and not to the mode of reaching it. But all other rights must be expressly mentioned. The required rights of way should be stipulated for, and not left to be implied from the grant. And in mineral districts the owner of the land should make such reservations with respect to rights of way as may seem to be probably required for future mining operations. Way-leaves are sometimes of great value, and when they may probably be required, they should be reserved in all farming leases. Every prudent lessee should secure to himself all necessary rights of way, as well from other persons as from the grantor, before he begins to work.\*

If any parts or rights are to be *excepted*, they should be set out and described before the insertion of the habendum, as, for instance, different strata from those demised, rights of way above and below the surface, &c. &c.

The habendum is that part of the lease which begins

\* Bainbridge on Mines, 200.

with "To have and to hold." Its office is to fix the number of years for which the lease is to continue, if it be for years; and if it be for lives, it states the number, names, and description of the lives during which it is to run. In short, it defines the quality and the quantity of the estate. If the lease is granted for seven, fourteen, or twenty-one years, or other different periods, then, in the absence of any further stipulation, the lessee only has the choice at which of the periods the lease shall end. When there are more lessees than one, the habendum should express whether they are to take as joint tenants, or as tenants in common.

The reddendum, or reservation of rent, is a clause in the lease by which the lessor reserves some new thing to himself out of that which he had granted before. It is usually made by the words "yielding and paying," or similar expressions. It must be by certain and apt words. Thus, a lease for years, reserving rent "after the rate" of £18 a year, is void for uncertainty. It must be of some other thing *issuing out of the* thing granted, and not a part of the thing itself, for that would be an *exception* out of the thing granted, and not a rent. Therefore, the reservation in a mineral lease, of some proportion of the mineral in its natural state, is not strictly a rent, but an exception. There can be no distress for such a species of rent. Whereas, the reservation ought properly to be of such a thing as that the grantor may have the resource of distraining for it, even without special stipulation.

"In mines of coal the rent is usually in money, and in many instances is made to vary with the market

price of the article. In the coal districts of the north of England, the demise is usually made subject to an annual certain rent, and also to what is called a *ten-tale* rent. Sometimes a rent of a certain sum of money for every ton is payable; but in case the rent thus payable shall not amount to a certain sum in every year or part of a year, then the deficiency is to be made up by a further payment, unless the mine shall be incapable of producing to the extent which would be required for yielding the landlord's rent. The lessee is still left at liberty during any subsequent period of his lease, to work a quantity of coal equal to such deficiency, without further payment. In other districts a distinct proportionate part—as one-seventh—of the money realised by the sale of the coals raised is reserved, with such an additional sum, if required, as may always yield to the lessor a certain fixed rent, unless the mines are incapable of producing a specified number of tons in the week. This proportion, however, varies indefinitely, according to the nature of the operations, the supposed risk, the amount of expenditure, and the general circumstances. Special rents or renders are fixed for out-stroke rights, way-leaves for general purposes, and other privileges.”\*

There is some difference between the usual forms of colliery leases in the north of England and those of the great Welsh coal-field. The term is generally shorter—and separate rents are sometimes reserved in respect of the use of the shaft, way-leaves over the surface, and underground way-leaves and outstroke.

\* Bainbridge on Mines, 203.

In Wales these are in general included in the "way-leave." The reservation of the royalties is often expressed in a different form.

When lands are let with the mines it is usual to reserve a surface rent, without reference to the mines.

The covenants come next. The word "covenant" means a clause of agreement *in a deed*, by which either party may stipulate for the truth of certain facts, or may bind himself to perform, or give something to the other, or to abstain from some act which, if done, would be prejudicial to another. The general principle is clear, that the landlord may annex whatever condition he pleases to his grant, provided it is not illegal or unreasonable. A covenant is either expressed or implied. It exists either in fact or by construction of law. An express covenant is an agreement by deed in writing, sealed and delivered. An implied covenant is that which the law implies from the relation established between the parties by a particular deed, though it be not expressed in words.

No particular technical words are requisite to constitute a covenant. Any words which import an agreement are sufficient, when embodied in a deed properly executed. A covenant gives to the covenantee and his representatives, in case of its breach, a right of action for damages, against the covenantor and his representatives.

As to the construction of covenants, the general rule is, that all contracts are to be taken according to the intent of the parties, expressed by their own words. If there is any doubt upon the sense of the words, such construction shall be adopted as is most

strong against the covenantor.\* Deeds, including, of course, leases by deed, being the highest description of private written documents, are themselves the best evidence of the facts which they contain, and of their makers' intentions. In their construction, regard must be had to all their parts; and general words may be restrained by particular recitals. If a deed operates two ways, the one consistent with the intent of the party, and the other repugnant to it, the Courts will put such a construction on it as to give effect to such intent.

When a material word appears to have been omitted in a lease by mistake, and other words cannot have their proper effect unless it be introduced, such a lease must be construed as if that word were inserted, although the passage in which it ought to stand conveys a distinct meaning without it.

*Admission of Parol Evidence.*—The general rule with regard to the admission of parol evidence, to explain the meaning, or to add to, vary, or alter, the express terms of a deed, is that it shall not be admitted, except where (although the deed is clearly enough expressed) some ambiguity arises from extrinsic circumstances; where the language of a charter or deed has become obscure, and the construction doubtful from antiquity; where the grant appears uncertain from want of acquaintance with the grantor's estate; where it is important to show a different consideration consistent with, but not repugnant to, that stated in the deed; when it becomes necessary to show a different time of delivery from that at which the deed purports

\* See next chapter.

to have been made; where it is sought to prove a customary right not expressed in the deed, not inconsistent with its stipulations, or, lastly, where fraud or illegality in the formation of the deed are relied on to upset it.

If a clause in a deed is so ambiguously or defectively expressed that a Court of Justice cannot, even by reference to the context, collect the meaning of the parties, it will be *void* on account of uncertainty.\*

Covenants for the payment of the stipulated rent, and for the quiet enjoyment of the lessee, will be implied by law. The covenants that ought to be introduced, in general, into a mining or colliery lease, are these: By the lessee, that he will pay the rents, taxes, and outgoings, and make compensation for damage and spoil done to the lands and grounds; to work the colliery in a proper manner according to the regular course; to deliver monthly accounts to the lessor; keep plans of the workings; cause the coals to be weighed; allow the lessor or his agents to inspect the works, and also the books; to leave a barrier of a certain width against any other colliery adjoining the same; and not do any act whereby the colliery may be injured; to yield up the premises quietly at the end of the term in good condition; that the lessor may sink shafts, &c., a certain time before the expiration of the term; permit the lessor to enter; not assign or underlet without leave in writing; with *special stipulations* in some cases as to working the seams in specified proportions, and paying an additional rent for a greater proportion of

\* Woodfall's Landlord and Tenant.

coal got out of a particular seam; and not to take more than a certain proportion out of certain seams; and to sink certain pits to a certain seam, and raise the coal at those pits from that seam, &c. &c.

The lessor covenants for quiet enjoyment; and the other objects and intentions of the parties are usually effected by provisoes or conditions.

These differ from covenants in being binding on both parties. But mutual covenants may be introduced to effect these purposes. Conditions are either precedent or subsequent. When a condition must be performed before the estate can commence, it is called a condition precedent; as where the lessor grants to his lessee for years that on payment of £100 within the term, he shall have the fee simple, this is a condition precedent, and the fee will not pass till the £100 be paid. But if a man grants an estate in fee simple, reserving to himself and his heir a certain rent, and that if that rent be not paid at the time specified, it shall be lawful for him to re-enter and make void the estate granted; here the grantee has an estate upon condition subsequent, which may be made void if the condition is not performed.\* Conditions, as well as covenants, are to be construed according to the real intentions of the parties. The usual provisoes are, that the lessor is to have the option of purchasing the stock, tools, materials, and machinery, at a fair valuation, or otherwise the lessee is to be entitled to remove them; for re-entry on non-payment of rent, and for referring disputes to arbitration.

In leases of collieries it is also common to insert

\* Steph. Blackstone, i. 277.

provisoos that the lessee shall not be bound to work through creeps, old waste, &c., that the lessee may lay waggon ways, staiths, spouts, &c., with an option to the lessor to take them at a valuation at the end of the term; for power to the lessor to distrain for rent; and that the lessee within a certain time from the end of the term may take away all coals then at the bank, &c. Conditions are most properly created by using the words "on condition;" but the word commonly, and as effectually made use of, is "provided."

It is also usual to introduce a power for the lessee to put an end to the term at the end of any one year, or at certain specified periods. And in some leases of coal mines, it is agreed that during any suspension of the works by unavoidable accident, the rents shall cease to be payable, and that in case of a partial suspension the rents shall be apportioned; that the mines may be shown within a certain time from the expiration of the lease to parties desirous of becoming the tenants; that the lessor, if required, will grant a new lease to the same party; and that the lessee shall erect certain specified buildings and machinery.

It is customary to introduce covenants by the lessor for quiet enjoyment and for further assurance. A learned writer suggests that it would be very proper for him to enter into covenants for title also, on the ground that when much capital is laid out by the lessees they may be really regarded as purchasers. And when no investigation into title takes place, as is frequently the case, there is the more reason for the insertion of such a covenant.

A form of the lease of a colliery will be found



inserted in the Appendix, and another of the lease of a way-leave.

*Licences.*—It is important to keep in mind that a lease which gives an exclusive interest must be distinguished from a mere licence. Thus a grant that it shall be lawful for a man, his heirs and assigns, at all times to enter upon the lands to search and dig for coal, is only a licence, and conveys no interest so as to enable the grantee to exclude the grantor from getting coal.\* And where the owner of the fee granted by indenture to A. and his partners liberty to dig for metals throughout certain lands, with specified powers of working, excepting to the grantor certain liberties for driving adits, &c., for the term of twenty-one years; and in the indenture were contained covenants by the lessee for the payment of a royalty, and other covenants, and a proviso for re-entry on non-performance,—it was held that this deed was a mere licence.†

*Distinction between Lease and Agreement.*—Some of the leading cases on the subject of the present chapter are the following. It is often a matter of dispute whether an instrument is an agreement for a lease or an actual lease. The case of *Doe d. Morgan and others v. Morgan and Powell* (14 Law Journ. C.P. 5) contains the doctrine on this point in very clear language. The instrument then in question ran as follows: “M. T. D. hereby agrees, for himself, his administrators, and executors, to let and grant a lease to M. W. and W. of the coal, iron mine, &c.,

\* *Cheetham v. Williamson*, 4 East, 469.

† *Doe dem. Hanley v. Wood*, 2 B. & Ald. 724.

under the property there mentioned, at 9*d.* per ton for coal, &c., for the term of seventy years from the 2nd of February, and that so much royalties as will amount to £50 a year be worked or paid for during the term, which rent is to commence in a year from the time a pit is sunk through the four-foot coal, with power to work the said minerals; and to deposit rubbish and making a wharf as is usually granted in such leases of a similar nature; and by M. T. D. power was given to the lessees, on giving six months' notice, to quit the same, &c. &c., the lessees bound themselves to commence sinking a pit before the 24th of June next; and the said M. T. D. engages to sign a lease on the said terms, as soon as it can be prepared." Chief Justice Tindal said that "the Courts are to judge of the intention of the parties in construing an instrument of this nature, and for this purpose they are to look at the instrument itself, and at the subject matter of the intended demise; but I am not prepared to say they can look further. In discovering the intention of the parties to this instrument, it is important to consider first, whether it contains any words of actual demise; and secondly, whether possession was actually given at the time of the instrument being made." Mr. Justice Erle said: "In order to discover the intention of the parties, we are to look at the words of the instrument, and the state of the premises. Looking at the premises, they are of a nature which peculiarly require a more formal instrument. Looking at the instrument, both parties would suffer if this were construed to be a lease. There would be no certainty of any rent ever being payable to the land-

lord, and there would be no means of access to the mineral demised to the tenants. It would be essential to the tenants to have the right of depositing rubbish, and of a wharf, but this instrument would not operate to pass such a right. There is also no time stipulated for taking possession, for though the tenants are to commence sinking a pit before the 24th of June, yet if before that time the lessor had prepared a lease, and the lessees found he had no title, the lessees would be discharged from their stipulation. Upon these grounds and others, I think this instrument is an agreement only."

The allusion to the right of laying rubbish, and making a wharf, not being passed by this instrument, is founded upon the rule, that these rights are in the nature of easements, and that easements, being incorporeal hereditaments, can only be effectually passed by deed.

In the case of *Doe dem. Wood and another v. Clark* (14 Law Journ. Q. B. 233), Mr. Justice Pattison said: "In order to constitute any particular instrument a lease, and not an agreement for a future lease, we must be able, looking at it, to say confidently, *when* the interest of the tenant is to commence."

*Re-entry*.—If there be a power of re-entry after a notice to be given to the persons who work the mines, the form of that notice must be strictly followed. Thus, in the case of *Musket v. Hill* (5 Bing. N.C. 694), there was a proviso in a licence that if the grantee (after notice to work the mines effectually, according to the laws of good mining) should fail to keep six miners at work, and that if notice in writing should be given

of the grantor's intention to avoid the licence because of such failure, then, after a month, it should be lawful for the grantor to re-enter, &c.; and the grantor gave notice to the grantee that *unless* he kept six miners at work he would re-enter after a month,—it was held that such notice did not avoid the licence.

Where there was a proviso, determining the lease, if the tenant should at any time cease working two years, and he did cease for two years; and the lessor afterwards received rent,—it was held that the lease was only *voidable* at the option of the lessor, and that he might put an end to the lease upon any cessation to work commencing two years before the day specified in the declaration.\*

In another case† a licence had been granted to the defendant to enter upon certain lands to dig for ore, for a term of twenty-one years. There was a proviso that if he ceased to work the mines for six months, or broke any other of the covenants in the licence, then the indenture should cease, determine, and be utterly void, and of no effect. It was held that the word void was to be construed to mean *voidable*, and that some act of the lessor to show his intention and determination to put an end to the licence, and enforce the forfeiture, was necessary for that purpose.

*Acceptance of Rent after Forfeiture.*—The general rule is that a forfeiture of a lease is waived by the landlord distraining, or suing for, or accepting rent after the occurrence of the fact which constitutes the forfeiture, provided the fact was known to the lessor

\* *Doe d. Bryan v. Banks*, 4 B. & Ald. 491.

† *Roberts v. Davey*, 4 B. & Adol. 665.

at the time ; but the subsequent receipt of rent due prior to the forfeiture is no waiver.

*Waiver.*—But if a lessor elects to waive his power to forfeit the lease on one occasion, he may, of course, take advantage of another opportunity to do so, if a subsequent act of forfeiture occurs. And if the covenant is a continuing one (such as a covenant to insure and continue insured certain premises), a breach subsequent to the waiver will entitle the lessor to re-enter.

If a lessor perceives a continued act of forfeiture, there is no waiver without some distinct act on his part ; but if he permits the tenant to lay out money in improvements it will be a question for the jury to say whether such evidence would amount to proof of his sanction and concurrence. So, where a landlord finding the premises out of repair, gave the tenant three months' notice to repair according to his covenant, it was held in the case of *Doe d. Morecroft v. Meux* (4 B. & C. 606), that he could not maintain ejectment for a forfeiture until three months had elapsed, and also that the notice was a waiver of the breach of the covenant to repair.

*Re-entry.*—We proceed to consider how the landlord may exercise his right to put an end to the lease after an act of forfeiture. If the act of forfeiture be the non-payment of rent, an actual demand of the rent must be made previously to commencing an action of ejectment (now called an action for the recovery of land) for the exact amount due, and on the very day when it becomes payable, and with other formalities which it is difficult to fulfil accurately. But if the

lease contains a power of re-entry for non-payment without further demand, after the rent is in arrear a certain number of days, then the landlord may maintain an action of ejectment without an actual re-entry or demand of rent; and so also in cases where half a year's rent is in arrear and no sufficient distress is to be found on the demised premises, or any part thereof, countervailing the arrears then due. It is also to be observed that an actual entry upon an estate generally is an entry for the whole, and if it be for less it should be so defined at the time. It is not absolutely necessary that there should be an actual entry by the grantor to put an end to the estate granted. The object may be effected by the entry of persons claiming interests or authority under the grantor.

*Relief in Equity.*—Cases of forfeiture are jealously considered by Courts of Law and Equity. Formerly a lessee might be relieved from the forfeiture by an offer of the rent at any time, even after an action of ejectment had been brought. But by the statute 4 Geo. II. c. xxviii., it was enacted that, if the tenant shall suffer judgment and execution without paying the rent and arrears with costs, and without filing any bill for relief in equity within six calendar months after the execution, he should be barred from relief. But if at any time before the trial he should pay, or tender the rent and costs, the ejectment would be stayed.

The general rule is, that relief will be given against forfeiture by breach of covenant by the lessee when compensation can be made. And as against a clause of re-entry (that is, the right to eject) for breach of a certain class of covenants, relief in equity is not limited

to mere cases of accident, but is granted even against negligence and voluntary acts. But there is no relief against a forfeiture by breach of a covenant not to assign without a licence, nor by breach of a covenant to keep premises insured. A form of proviso will be found in the Appendix which places re-entry on a very fair and reasonable basis.

For a great number of years it has been considered to be law that if a lessee may not, by the term of his lease, assign his interest without a licence so to do, yet, if he did so obtain a licence to assign once, the condition was gone, and the assignee might again assign without licence. This difficulty has now been put an end to by the legislature. It is enacted by the 22 & 23 Vict. c. xxxv. s. 1, that "where any licence to do any act which without such licence would create a forfeiture or give a right to re-enter, under a condition or power reserved in any lease, &c., shall, after the passing of the Act, be given to any lessee or his assigns, it shall, unless otherwise expressed, extend only to the permission actually given, or to any specific breach of any proviso or covenant, or to the actual assignment, under lease, or other matter thereby specifically authorised to be done, but not so as to prevent any proceeding for any subsequent breach (unless otherwise specified in such licence); and all rights under covenants and powers of forfeiture and re-entry in the lease contained shall remain in full force and virtue as against any subsequent breach of covenant or condition, &c., not specifically authorised or made dispunishable by such licence, &c., in the same manner as if no such licence had been given, and the condition

or right of re-entry shall remain as if such licence had not been given, except as to the particular matter authorised to be done."

By the 23 & 24 Vict. c. xxxviii. s. 6, it is enacted that "where any actual waiver of the benefit of any covenant or condition in any lease on the part of any lessor, or his heirs, executors, administrators, or assigns, shall be proved to have taken place after the passing of this Act, in any one particular instance, such actual waiver shall not be deemed to extend to any instance, or any breach of covenant or condition, other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of such covenant or condition, unless an intention to that effect shall appear."

Since the last edition, the Conveyancing and Law of Property Act, 1881, 44 & 45 Vict. c. xli., which contains various important provisions for the protection of tenants in restriction on and relief against forfeiture of leases, has become law.

Sect. 14 provides as follows :

Sub-section 1 : "That a right of re-entry or forfeiture under any proviso or stipulation in a lease (even if inserted in pursuance of an Act of Parliament, sub-section 4) for a breach of any covenant or condition in the lease, shall not be enforceable by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy the breach, if it is capable of



remedy, and to make reasonable compensation in money to the satisfaction of the lessor for the breach."

Sub-section 2 empowers the Court, when the lease is proceeding by action or otherwise, to grant any such relief, and upon such terms as it thinks fit, upon the application of the lessee.

By sub-section 3, a lease for the purposes of the section includes an original or derivative under-lease, also a grant at a fee farm rent, or securing a rent by condition; and a lessee includes an original or a derivative under-lessee, and the heirs, executors, administrators, and assigns of a lessee, also a grantee under such a grant as aforesaid, his heirs and assigns; and a lessor includes an original or derivative under-lease, and the heirs, executors, administrators, and assigns of a lessor, also a grantor as aforesaid, and his heirs and assigns.

Sub-section 4. This section applies, although the proviso for re-entry is inserted in the lease pursuant to Act of Parliament.

Sub-section 5. For the purpose of this section a lease, limited to continue as long only as the lessee abstains from committing a breach of covenant, shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

By sub-section 6, the section is not to extend (1) to a covenant or condition against the assigning, under-letting, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest; or (2) in the case of a mining

lease to a covenant or condition allowing the lessor to have access to or inspect books, accounts, records, weighing-machines, or other things, or to enter or inspect the mines or the workings thereof.

By sub-section 8, the section "shall not affect the law relating to re-entry or relief in case of non-payment of rent, and by sub-section 9, it is made to apply to leases as well before as after the Act.

In the case of *Quilter v. Mapleson* 9 ch., d. 803, the Court of Appeal held that the Act is not confined to breaches taking place after it came into operation, but extends also to breaches committed before the Act, and to proceedings pending when the Act came into operation.

## CHAPTER III.

### COVENANTS IN LEASES.

QUESTIONS have frequently arisen upon conditions or covenants inserted in leases of coal mines binding the lessees to work the mines as far as they ought to be worked. The result of the cases seems to be the equitable ruling, that such stipulations are sufficiently complied with if the lessees have *bonâ fide* made sufficient experiments to show that there are no such minerals, or that they are not *fairly* workable.

*Covenants to work the Coal.*—In the case of *Hanson v. Boothman* (13 East, 22) a lessee covenanted that he would forthwith proceed to sink for coal, so far as ought to be accomplished by persons acquainted with the nature of collieries, and as in such cases was usual, and also to erect certain engines. Disputes arose, which were referred to arbitrators, who awarded that the lessees had not performed their covenants, inasmuch as they had not sunk for coal in the manner mentioned in the lease ; and the said arbitrators proceeded to define that the lessees should pay a certain sum of money, and work the mines and erect the

engines. They accordingly did so, but afterwards desisted, and an action was brought by the landlord, to which the lessees pleaded that they would have continued to work the mines, and would have erected the engines, but that there were no mines of coal in the lands which ought to be worked by any person acquainted with the nature of collieries, or which it was in such cases usual to work, or which would have defrayed the expense of working, and that they had ascertained the truth of this by trials. Lord Ellenborough held that this plea might be no answer to the alleged breach of covenant for the time past in not trying to get the coal, *yet it was an answer to any further breach* that they had tried as far as they could and ought to do in the judgment of persons of competent skill, and as far as was usual and customary, and that no coal could be got. It was suggested, however, that it would be better to take issue upon the sufficiency of the experiments made by the defendants, and leave was given to amend for that purpose.

In the case of *Jones v. Shears* (7 Car. & Payne, 346) a tenant had agreed to work a coal mine, so long as it should be "fairly workable." There were coals in the mine, but of such a description that it would not pay to work it. It was held that under these circumstances the tenant was not bound to work the mine, and that under the words "fairly workable" a tenant was not bound to work at a dead loss. This was, however, the individual ruling of Mr. Justice Coleridge.

In the case of *James v. Cochrane* (22 Law Journ. Ex. 201, and 8 Excheq. 556) the covenants were very

obscure and ambiguous, and there was no express obligation on the lessees to work the mines at all. There it was held that the lessees could not be compelled to sink a pit for that purpose, even though it was doubtful whether any other mode, by way of outstroke or adit, was authorised by the lease.

In the case of *Morris v. Smith* (3 Doug. 279), a lessee had covenanted in a coal lease to pay a certain proportion of the value of nine hundredweight of the coals to be raised, unless he were prevented by unavoidable accident from working the pit. The defendant pleaded that he had been so prevented by unavoidable accident. It appeared in evidence that the accident might have been remedied at a greater expense than the value of the coals to be raised. It was held that the lessor was entitled to recover upon the covenant, on the ground that the accident was not of such a nature as to render the working of the pit impossible, but only more difficult and expensive.

In the case of *Phillips v. Jones* (9 Sim. 519), the plaintiff was lessee of a coal mine, at the rent of £300 a year, and subject to a royalty of ten shillings for every wey of coals raised in each year above six hundred, that being the quantity considered to be paid for by the £300 a year, and the plaintiff was authorised to put an end to the lease on the coal being worked out. The plaintiff worked the mine for several years, and when it was nearly exhausted, he was prevented by accidents and defects in it from continuing to work it, except at a ruinous expense. The Court refused to restrain the landlord from suing for the rent of £300 a year; though the plaintiff

offered to pay him ten shillings per wey for all the remaining coal. It must be observed that in this case the power of abandoning the work had been limited to entire exhaustion, and it was agreed that the certain rent should be paid at all events.

In the case of the *Marquis of Bute v. Thompson and others* (14 Law Journ. N. S. Ex. 95), the lessee of a coal mine underlet it to the defendants, who covenanted to raise and work 13,000 tons of coal in each year, and pay at the rate of 8*d.* per ton royalty for the same, or pay that amount of money, namely, £433 6*s.* 8*d.*, as fixed rent, whether the coals should be worked or not, and also 9*d.* for each ton over and above that quantity, to whatsoever extent the coals should be worked. An action was brought for the rent, and the defendants pleaded that by the fair and proper working and getting of the coal claimed, the same was before the half year claimed for greatly exhausted, and that less than a fourth part of the 13,000 tons was left. This plea was founded upon the supposition that the existence of a sufficient quantity of coals to make up the royalty was a condition precedent to the plaintiff's right of action. But the Court of Exchequer held that the stipulation for a fixed rent, coupled with a covenant that coal should be worked to that extent, and if above it, that there should be a payment of 9*d.* for each ton over and above, did not carry with it, by any implication, a condition that there should be coals to that amount capable of being wrought. "It appears to us," said Chief Baron Pollock, "to be a stipulation on the part of the defendants, that they will work and get that quantity, and if they did not get it, that they would pay a fixed rent to the landlord; and we cannot

import into that covenant a condition that there should be coals to that extent. If that was the intention of the parties they should have so expressed it."

In the case of *Mellers v. Duke of Devonshire* (22 Law Journ. C. C. 310), certain rents were reserved in the lease for every acre of two beds of coal, and it was also stipulated that every year the tenant should work not less than two acres of two beds of coal, or would pay for that quantity at that rate every year, whether the same could be got or not. The lessee filed a bill for cancelling the lease, on the ground that the coal in one bed could not be freed from water so as to be worked; that this fact could not be known before the lease was granted; and that the other bed was so broken by faults as to render it impossible to procure the stipulated quantity. But it was held that such a mistake on the part of the lessee was not relievable; that every mining lease was granted in ignorance of what might be got; that the parties make terms accordingly; and that the lessee was bound to pay the rent.

In the case of *Jowett v. Spencer* (15 Law Journ. N. S. Ex. 347), the plaintiff had granted to the defendant certain coal mines, and the latter covenanted to pay £40 for every acre of coal which should be found, and till the price was fully paid to pay £40 in each year, whether the whole of an acre should be got or not in one year. It was contended that the finding of the coals was a condition precedent to the obligation to pay in either case. But it was decided that the indenture operated as an absolute sale and conveyance of the coal, and that the word "found" means *ascertained to lie and be*.

In the case of *Green v. Sparrow* (cited 3 Swanst. 408), a rent of £600 a year was reserved in a lease of coal mines, the first quarter to be payable at the next feast after the tenant should have worked one thousand stacks of coal. He covenanted that he would dig the thousand stacks without delay. It was alleged that the defendant, after having entered, had worked before the first quarter-day the thousand stacks of coal, except a small quantity, and had then fraudulently avoided completing the quantity before Lady-day in order to escape the stipulated payment on that feast. Lord Chancellor King considered that there was fraud in preventing the digging before the quarter-day, in order that the rent might not commence so soon, and that this fraud required the interposition of the Court. It was therefore decreed that the defendant should pay the first quarter's rent at Lady-day, on the ground that the thousand stacks would have been dug by that day had it not been for the fraudulent delay of the lessee.

As to a covenant to work coal uninterruptedly, efficiently, and according to the usual or most improved practice, with a reservation in the lease of a dead rent, the case of *Wheatley v. Westminster Brymbo Coal Company* (9 Equity Rep. 533) is important. The plaintiffs had leased coal to the defendants, reserving a minimum rent of £750, to be increased to £1,000, if pits should be sunk on the estate, with a royalty on all coal gotten beyond a certain quantity. The lessees entered into the covenant above-mentioned. They paid the dead rent, but only raised small quantities by working through an adjoining mine, and sunk no pit on the plaintiff's property. The latter filed



a bill for specific performance, expecting that the defendants would be compelled to sink. But it was held that there was no obligation to sink pits, though that might be the most efficient method ; and that, so long as the dead rent was paid, the defendants *could not be compelled to work the mine at all*, and that if the lessees had committed a breach of contract, their remedy was by an action at law, as the Court of Equity would not refer to the Master to direct the management of a coal mine.

Two other cases relating to the construction of covenants in colliery leases are valuable guides.

In the case of *Quarrington v. Arthur* (10 M. & W. 335), the plaintiff had demised to the defendant all the mines and beds of coal which had been, or during the demise should be, discovered or opened under certain lands, at the yearly rent of £20, to be paid whether the coal should be worked or not, together with 7*d.* per ton for every ton of coal raised. And the defendant covenanted that he would at all times during the demise work the mines in a workmanlike manner. The breach of covenant assigned was that he permitted the mines to lie and that no coals were gotten. To this it was pleaded that the mines were never before the demise worked or gotten, and that the defendant had never at any time since or during the demise worked or got the mines. It was held that under these circumstances the defendant was not liable on this covenant, because the subject matter of the demise was not all the mines under the lands, but only such as had been or should be discovered or opened.

In the case of *James v. Cochrane* (22 Law Journ.

Ex. 201), the lessees had covenanted to leave unworked a barrier between their works and the adjoining mine, except where the lease gave them liberty to break through it. The liberty reserved was to make "outstrokes," or other communications through the barrier for the purpose of conveying coals underground got in any of the adjoining collieries belonging to the lessees, from such colliery into the demised mine, and by such outstrokes and communications to convey underground the coals from such adjoining collieries into the mine, and from thence to convey and carry away all such coals, and also draw to bank at any of the pits or shafts sunk or to be sunk by the lessees, in any of the lands and grounds demised, the coals from such adjoining collieries. It was held that this liberty extended to authorise the lessees to break through the barrier for the winning coal of such adjoining mines, though the coal of such demised or adjoining mines, when won, was not to be, nor was, brought to the surface through a shaft in the demised land, and although no such pit in fact existed.

Some provisoes in the lease also spoke of shafts in the demised lands, but there was no express covenant to make any shaft. There was also a covenant that the lessees would draw to bank at some of the shafts of the said colliery, provided they should be shafts from which the coals of the demised colliery should not be worked by an outstroke. It was held that under these provisoes there was neither express nor implied engagement by the lessees that bound them to sink a shaft in the demised land.

There was also a covenant that the lessees would

keep the levels, drifts, and necessary staples for air in good repair, order, and condition. It seemed to be the opinion of the Court that the fact of allowing the workings and air courses of an old seam of the mine which had been partially worked, but was now being worked no longer, to remain full of water, was not a breach of this covenant.

A valuable judgment in connection with the working of coal under certain covenants was given in the case of *Lewis v. Fothergill*, L. R. 5 Ch. App. 103 on appeal, on an application for an injunction. Mr. Fothergill had taken a large tract of minerals from the plaintiff. He also worked other minerals adjacent to these, under a different owner and lease. In order to avoid the outlay of £30,000 at least in sinking on the Lewis estate, he approached those minerals from his previous workings. It was sought to restrain him from so doing by means of any headings or instrokes from the other estate or from any workings *to the rise* of the Lewis estate, and from working in such a manner as to prejudicially affect the working of the other seams in the said estate, and otherwise than in a workmanlike manner, and unless adequate means of *draining* the coals and minerals under the Lewis estate shall have been provided. The remainder of the dispute will be best gathered from the language of the Vice-Chancellor James, before whom the case first came. He said: "The agreement which I have to construe, as applying to the facts proved in this case, is the mere ordinary mineral agreement, the covenants are mere ordinary covenants in an agreement for a mineral lease. It is a lease of a certain farm containing 245 acres at least of the minerals under the farm,

with a dead rental or royalty of so much a year, with a proviso that if the quantity of coal worked in any year shall not amount to the annual rental of £500, then instead thereof the annual rent or sum of £500 at least shall be paid as fixed or dead rent. There is then a proviso with respect to that fixed or dead rent, as follows: The fixed or dead rent of £500 not to be charged at all for the three first years, provided the necessary steps are *bonâ fide* taken, with ordinary despatch, to win and work the said coal, but the dead rent, or royalty, is only during those three years to be charged upon the quantity, if any, actually worked. Then the lease is to contain a five years' average clause, to the intent that no more than £2,500 shall be paid by the lessees for sleeping or dead rent, and royalties in any five years of the said term of 99 years, unless the quantity of minerals actually worked in the same five years shall amount to more. There is, I believe, every covenant that is usually included in a mineral lease specified here. There is then a covenant for working the said coal and mines in a proper and workmanlike manner; then I should say that the lease is to be for 99 years; and then there is a power given to the lessees to take so much land as they may require, and upon that land to make any roads that may be necessary for conveying the minerals, to sink pits, drive headings, and to do all other acts and deeds necessary for working the same. I do not know that there is anything in that document more than I have read, which is material for the proper construction of the instrument. The contention on the part of the plaintiff is this, that this being a lease of minerals under a farm of very great extent, there was to be

implied in this a covenant that the property shall be won by means of an independent system of drainage provided on the estate itself, by sinking pits down to the coal, and working the coal from those pits upon the estate. . . . I am utterly unable to see where I have power to introduce any such covenant as that into an instrument so precise as this, any more than I have the power to introduce any other possible covenant that might be suggested. I see nothing to imply that he (the lessee) shall not work his coal in such manner as he shall think fit for himself in combination with, or not in combination with, another property of the same kind which he may hold."

Their second contention was that although defendants might have a right of working it in connection with other property, they had no right so to work it in connection with other property, by sinking to the deep, as to expose the deep workings to be drowned, if from any cause at any time they did not keep up a sufficient means of drainage upon the estate itself; in other words, that working by instroke without providing means of pumping upon the estate itself was illegal and improper, as not being a proper and workmanlike manner of getting the coal.

Their third contention was that the defendants had not taken the necessary steps, *bonâ fide*, with ordinary despatch, to win and work the coal. Upon all three contentions, Vice-Chancellor James decided, upon the evidence and upon the construction of the agreement, against the plaintiff; and, his decision being appealed against, was supported (see L. R. 5 Ch. App. 103), it being held that the lessees were working in a proper and workmanlike manner by working the coal by

instroke, and that had the lessor intended to compel the lessees to sink a pit, he should have so stipulated in the agreement. In his judgment, Lord Hatherly said: "A proper and workmanlike manner may not mean the best possible mode of working for the lessor, but it means in such a manner as shall not be simply an attempt to get out of the earth as much mineral as can be got for the particular purpose of the lessee, regardless of any ordinary or workmanlike proceeding. As regards the demand for rent, the ordinary course which this Court always takes with reference to an agreement for a lease of this kind is to say that the plaintiff shall have specific performance of the agreement, that the deed shall be executed and shall be dated as on the day of the agreement, so that the lessor can have his action on the covenant as soon as the lease is completed. I conceive that the coal is *won* when it is put in a state in which continuous working can go forward in the ordinary way."

When a lease of certain collieries, comprising among others the A, B, and C mines, of which the A mine was the uppermost and the C mine the lowest, contained a covenant that the lessees should work the mines "in the best and most effectual manner, to the best advantage and according to the common mode and usual practice of carrying on all coal work and collieries with effect," and the lessees ceased working the A mine and worked the B mine in advance of the C mine; it was held that under the terms of the covenant, the defendants were entitled to work any of the mines without working all, or all that they had commenced to work; and that the mode of working adopted

—whether the best possible mode or not—was, according to the evidence, the common mode and usual practice, and there was no ground for saying that the defendants were committing a breach of covenant. (Lord Abinger *v.* Ashton, L. R. 17 Eq. 358 ; 22 W. R. 582).

A covenant in a coal mining lease to work and carry on the mines in a proper and workmanlike manner, is not to be construed as a covenant to continue working. Nor, under such a covenant, is the lessee bound to sink a pit if he can carry on the work by headings from an adjoining colliery. And where the lessees of a colliery, being in possession of the mines adjoining and to the rise of a particular mine, worked the mine by drivings from their own mine, and in exercise of powers contained in their own lease, made a channel through which the water flowed from their own to the adjoining mine by gravitation, it was held that they were not liable to make compensation for damage caused by the water so flowing. (*Jegon v. Vivian*, L. R. 6 Ch. 742 ; 40 L. J. Ch. 389 ; 19 W. R. 365).

*Construction of a Reservation of Minerals.*—Where a person granted land of which he was the owner in fee to another, reserving to himself all the coals and minerals, with full liberty to dig for and take them, making fair compensation for damage to the surface, it was held that under this reservation he was not entitled to take all minerals, but only so much as he could get, leaving a *reasonable* support to the surface. The damage complained of was done to a house and garden, &c. In giving his judgment Mr. Baron Parke said : “The rule of law is that a reservation is to be construed strictly. Still it would reserve to the

grantor all that was not conveyed by the grant, provided the meaning and intention of the parties be clear. What is their intention here? It is clearly the intention of the grantor that the surface shall be fully and beneficially held and enjoyed by the grantee, he reserving to himself all the mines and veins of coal below. By reasonable intendment, therefore, the grantor can be entitled under the reservation only to so much of the mines below as is consistent with the enjoyment of the surface, according to the true intent of the parties to the deed; that is, he only reserves to himself so much of the minerals as could be got, leaving a *reasonable* support to the surface. I do not mean to say that all the coal does not belong to the defendants, but that they cannot get it without leaving sufficient support.\*

*What Covenants run with the Land.*—Covenants are said to run with the land, and extend to the assignee of each party, when they are for the benefit of the estate demised, or affect the mode of enjoyment; or (as it has been sometimes expressed) when they touch or concern the thing demised. This rule prevails even although the assignee be not named. Thus a covenant to pay rent, to repair, or to leave in repair, will run with the land, as it affects the estate in the hands of any person who holds it. So a covenant to build a new smelting mill, in lieu of an old one, in a lease of mines, has been held to be a covenant running with the land, as it tended to the support and maintenance of the thing demised. But where in a lease of ground, with liberty to erect a mill, &c., the lessee

\* *Harris v. Ryding*, 5 M. & W. 76.



covenanted 'for himself, his executors,' administrators and assigns, not to have persons to work in the mill who were settled in other parishes without a parish certificate, it was held that this covenant did not run with the land, nor bind the assignee of the lessee.\* The distinction appears to be as between those covenants on the one hand which impose upon and attach to property certain incidents and burdens recognised by the law, by which it may be affected, or certain rights which may be enjoyed with it by other parties besides the owner; and on the other those covenants which create special incidents and burdens of a novel kind at the fancy or caprice of the owner.

Thus, though it appears that the law will not sanction the imposition by covenant of special and peculiar incidents on lands, so that the burden of them should be transferred to an assignee, the case is otherwise as between landlord and tenant. As between them more latitude is allowed. As a general rule, all *implied* covenants run with the land; and as to *express* covenants in a lease, the question is whether they sufficiently *touch and concern* the thing demised to be capable of accompanying the land from hand to hand, or whether they are so alien to it as to be mere personal obligations for a breach of which the covenantor shall be personally liable by himself or his personal representatives, having assets. But numerous decisions have already settled all dispute on this point as to various covenants commonly or occasionally inserted in leases. Thus, it is certain that the following covenants in leases "so touch and concern the thing demised" as

\* Congleton, Mayor of, v. Pattison, 10 East, 130.

to run with the land into the hands of successive assignees, viz.: for quiet enjoyment; for further assurance; to repair; to discharge the landlord from all burdens on the land; to cultivate or use the property demised in a particular manner; to grind at the lessor's mill, &c. &c. In the case of *Hemingsway v. Fernandez* (12 Law Journ. C. 130), the lessees had covenanted for themselves and their assigns to carry all the coals from a particular colliery, and all the coals from any other mines to be worked by them, in a certain township, at a rate or rent of 2*d.* a ton. The lessees assigned their interest to Fernandez, who refused to pay the 2*d.* per ton upon any other coal than that got from the particular colliery first mentioned; and he used another railway for such other coal. It was held by Vice-Chancellor Wigram that this covenant ran with the land and bound the assignee. But in this case the assigns were expressly named in the covenant, and he considered that it fell within the second resolution in Spencer's case. In that case\* (which is the leading one on this subject, and has been ably commented upon in Smith's Leading Cases) a person had covenanted for himself, his executors and administrators, with Spencer, in a lease of a house and land, to build a brick wall on part of the land so leased. The lessee assigned to another, and he again assigned. The action was brought against the assignee of the assignee. It was held that if the lessee had covenanted for him *and his assigns expressly*, the assignee would be bound. But not having done so, and considering that the covenant referred to a *new thing*, which

\* 5 Coke, 16; and Smith's Leading Cases, vol. i.

was not in being at the time of the demise, but was to be newly built afterwards, the assignee was not bound. It was deemed to be a collateral covenant of a personal nature, affecting the lessee and his personal representatives only. If, on the other hand, the covenant had referred to something then in existence, part and parcel of the subject matter of the lease, then the thing to be done by virtue of the covenant is in some sense annexed and appurtenant to the subject matter of the lease, and goes with the land, and binds the assignee, even if he is not expressly named. And it was distinctly laid down at the close of this case, that inasmuch as the reversioner or lessor could only assign the benefit of a covenant to his assignee by virtue of the statute 34 Henry VIII. c. xxxiv., and not by the rules of the common law, so that statutable power of assignment must be confined to covenants which *touch or concern* the thing demised, and not extend to collateral covenants.

There are covenants which are occasionally introduced into leases which are so qualified in their terms as to give rise to difficulties in their construction. For instance, in the case of *Clifton v. Walmesley* (5 T. R. 564), the lessee of a coal mine covenanted to pay a certain share of all such sums of money as the coal should sell for at the pit's mouth. It was sought to charge him with a liability to pay part of the money produced by sale of coals elsewhere, but he was held not liable under the covenant so to do.

*Means of Terminating the Contract.*—With respect to the means of putting an end to the demise, or lease, besides that of forfeiture by some breach of the cove-

nants contained in the lease, there are also the following means of terminating it, namely, by the period expiring during which the premises were leased; by cancellation of the instrument of demise; by surrender of the term; and by merger in the fee. A tenancy from year to year may, of course, be terminated by either party giving to the other a proper notice to quit.

*Statute of Frauds as to Surrenders.*—But by the Statute of Frauds it is provided, that “no leases, estates, or interests, either of freehold, or terms of years, shall be surrendered, unless it be by deed or note in writing, signed by the party so surrendering, or their agents lawfully thereunto authorised by writing, or by act and operation of law.” Therefore a lease for years cannot be surrendered by merely cancelling the indenture without writing.

Surrender by act or operation of law, or implied surrenders, are excepted. Of this kind are surrenders created by the acceptance of a new lease from the reversioner, either to begin at once, or at any time during the continuance of the first lease.

Merger takes place when there is a union of the freehold, or the fee with the term of years in one person at the same time. In such a case the greater estate merges or drowns the lesser, because they are inconsistent and incompatible.

*Notice to Quit.*—Notice to quit is necessary to put an end to a tenancy from year to year. It may be given by either landlord or tenant. It must always be given half a year previously to the expiration of the current year of tenancy, so as to expire at the

same period of the year in which the tenant entered on the premises. Thus, if the tenant entered on the occupation on Candlemas-day, the notice to quit must be served half a year previously to Candlemas-day. A valid notice to quit cannot be given to expire at any other time, unless there is some special agreement on this point, or some particular local custom intervenes. A written notice is not always necessary, but it is always expedient that it should be in writing. If given by an agent, he must have authority to do so at the time when such notice begins to run and operate. It should be clear and certain in its terms, not leaving any option or alternative. If sent by post the receipt should be acknowledged, or if served on the premises on a servant, the purport of it should be made known. The mere placing it in the hands of a servant, without further proof, is not sufficient. But where the term of a lease is to end on a precise day, there is no occasion for a notice to quit previous to bringing an action of ejectment, because both parties must be supposed to know the fact.

An important case, that of *Papillon v. Branton* (5 Excheq. 518), has lately been decided on the subject of notices to quit. Between nine and ten o'clock on the morning of the 25th of March a tenant put into the post-office in London a letter containing notice to quit at Michaelmas, addressed to the place of business in London of the landlord's agent. The agent was there until between five and six o'clock in the evening, and did not receive the letter, but found it there the next morning. It was held that this

was a sufficient notice, the jury having found that the letter was delivered on the 25th after the agent had gone away.

*Equitable Relief.*—A Court of Equity will not only carry into execution agreements for leases, and covenants in leases, by a decree of specific performance, but it will generally relieve persons from engagements made by them under circumstances in which fraud and injustice were ingredients on the other side. But it is a general rule that the party applying for relief must have an equitable title to the interference of the Court. They will not decree specific performance if an agreement be not certain, fair, and just, in all its parts. If the party desiring relief was, on entering into the contract, guilty of gross misrepresentation or deceit, the Court will refuse to order specific performance. And the Court never makes the decree where the act is impossible to be done, but leaves the applicant to his remedy at common law. An action, however, will lie for specific performance, though there be also a remedy at law; for the remedy by specific performance is often very superior to that of damages, and obtains that object for the grantee which no action could secure. And Courts of Equity will not only thus give relief when a transaction is tainted with fraud, and by decrees of specific performance of legal engagements, compel reluctant parties to fulfil them, but they will also interfere to set right mistakes in deeds or contracts, if the interests of parties are prejudiced by such mistakes. But where the contract is in writing they will not relieve against alleged mistakes, unless there

is clear proof of the mistake in the intention of the parties.

#### LICENCES.

There is a distinction between a lease of mines and a licence to work them. The lease conveys an actual interest or estate in lands, while the licence is only an incorporeal right to be exercised in the lands of others. To ascertain whether an instrument must be construed as a lease or a licence, the test is to ascertain whether the grantee has acquired by it *any estate* in the land, in respect of which he might bring an action of ejectment. If the land is still to be considered in the possession of the grantor, the instrument will only amount to a licence, and the grantee will have no property in the minerals till they are severed from the soil. Thus in the case of *Chetham v. Williamson* (4 East, 469), certain lands were by lease and release conveyed to a person who by the same deed covenanted with and granted to B., one of the parties to the conveyance, that it should be lawful for B., his heirs and assigns, at all times, to enter upon the lands to search for and dig for coal, and to take and carry away the same to his and their own use. This was held to be only a licence, and to convey no interest in the soil, so as to exclude the covenantor and those claiming under him from getting coal there.

*Licences to work.*—The language of a properly-drawn licence to work minerals marks this distinction clearly. “In consideration of the yearly rent,

covenants, &c., hereinafter reserved and contained on the part of the said C. D., his executors, &c., he the said A. B. doth by these presents grant and demise unto the said C. D., his executors, &c., full, free, irrevocable, and exclusive licence and authority to win and work all those quarries or strata of limestone, situate, &c., without any interruption, claim, or disturbance from or by the said A. B., his heirs or assigns, or any other persons whomsoever, and to carry away and dispose of the produce thereof to and for his and their own use and benefit; and for the purposes aforesaid to make and use any drains or watercourses for clearing the said quarries from any water which may flow or accumulate therein; and to erect all such sheds, buildings, steam-engines, machinery, and other conveniences, upon or near the said quarries, as shall be proper and necessary for effectually carrying on the said works, or for the workmen employed thereon; and also to use, repair, or construct any railways, or other ways or roads whatsoever, to or from the said quarries, except out of the licence hereby granted, all such stone as shall be situate under any dwelling-house, garden, orchard, corn-mill, or manufactory." Then follow the habendum, and the usual covenants, if it be desired to insert them.

. A licence of this description must be conferred by deed, on the ground that it gives a beneficial privilege in land. The exclusive right to work minerals will not necessarily be conferred by a grant to work them. But if such exclusive privilege be desired and intended, words to that effect should be inserted in the deed so as to protect the grantee.



The precedent from which the above extract is taken contains exclusive words which have this effect.

It is a rule of law that no rent can issue out of any *incorporeal* hereditament, because such inheritances cannot be distrained upon, except where the Crown is the lessor. Therefore rent, as *rent*, cannot be reserved upon a *licence* to work mines. But the reservation of rent in the same instrument by way of covenant or contract will entitle the lessor to an action of covenant or debt upon the lessee's undertaking to pay the same. The covenants of a grantee of a licence either for a freehold interest, or for years, will run with the interest in the minerals, as they would under a lease. And in other respects the incidents and construction of licences seem to correspond with those of mining leases.\* In all cases where any speculation or adventure in working minerals is in contemplation, it is important to ascertain whether the mineral property in question is free from any previous grant of licences or other reservations. But as the general practice with respect to mineral property in coals is to grant and take leases, and licences to work mines are chiefly concerned with adventures in lead, copper, and other metallic ores, it seems unnecessary to add more to these observations on licences, for which the writer is mainly indebted to the valuable work on mines referred to at the bottom of the page.

\* Bainbridge on Mines, 258.

## DISTRESS FOR RENT.

The law has furnished landlords with several methods of recovering rent, in the event of non-payment on the day it is due. They may proceed by an action for the amount of rent, or by distress on the premises. This last is the method most commonly resorted to. It is a remedy given to the landlord by the legislature, by which he may seize the goods of his tenant on the premises, sell them, and reimburse himself for the rent in arrear, and the cost of the proceeding. To authorise a distress there must be an actual existing demise at a fixed rent. If the landlord has treated the tenant as trespasser, he cannot distrain, for by so doing he has admitted that he is no tenant, and distress supposes a tenancy subsisting. So long as the goods are on the premises, he may distrain for one year's rent, even though the tenant be a bankrupt, and his goods in possession of the messenger. The same thing may be done in case of the tenant's insolvency. But in this last case he has no lien on the goods after they are removed, whereas, in bankruptcy, the landlord may prove for the remainder of his debt like any other creditor.

In general all goods and chattels found on the premises, whether the property of the tenant or a stranger, may be distrained. But articles on the premises in the way of trade, such as a horse at a smith's shop, tools and implements of trade in actual use, and some other matters, are exempted. A distress must bear some fair proportion to the sum

distrained for. It must be made in the daytime, and not till after the rent is due. If made after the tender of arrears it will be illegal. And though the tender be made after the distress, but before it is impounded, the landlord must deliver up the distress, and the expenses, if any, be paid by him.

By the 11 Geo. II. c. xix., goods fraudulently or clandestinely conveyed off the premises, to avoid a distress for rent, may be seized anywhere within thirty days after, unless *bonâ fide* sold to parties not privy to the fraud.

The place where the distress is deposited in security, or, as the phrase is, is impounded, may be on such part of the premises as is most convenient. But if the goods distrained are removed, notice must be given of the place where they are, and such notice should contain an inventory of the goods distrained. Unless the owner replevy the distress within five days after notice of the distress, the distrainor may have them appraised by the sheriff, &c., and proceed to sell by auction. The proceeds, after paying the arrears and expenses, must be retained by the sheriff for the owner of the goods. On the sixth day he may proceed to sell and remove the goods. If he remain on the premises after that time without the consent of the owner, he may be treated as a trespasser. A second distress may be made if the proceeds of the first are insufficient, or if the replevy be nugatory.

By the Common Law Procedure Act, 15 & 16 Vict. c. lxxvi., in the case of landlord and tenant, where half a year's rent is in arrear, and the landlord has

the right to re-enter for non-payment, he may bring an action for the recovery of his land without a formal demand of the rent. On proof that there were not sufficient goods to satisfy a distress, he shall have judgment and execution. But if the tenant pays all rent and costs before trial, the proceedings are to cease.

The question of a landlord's right to distrain upon certain fixtures of the tenant will be considered in the section that treats of fixtures.

#### STAMPS AND REGISTRATION OF LEASES.

By the 33 & 34 Vict. c. xcvi., leases of any lands or hereditaments which are granted in consideration of a fine or premium, are liable to the same stamp duties as for the conveyance on the sale of lands for a similar amount. Where the consideration or any part of the consideration is any rent, the ordinary duties are as follows:

		For 3 years or less.			For more than 35, but not more than 100 years.			For more than 100 years.		
		£	s.	d.	£	s.	d.	£	s.	d.
Rent not exceeding	5	0	0	6	0	3	0	0	6	0
" "	10	0	1	0	0	6	0	0	12	0
" "	15	0	1	6	0	9	0	0	18	0
" "	20	0	2	0	0	12	0	1	4	0
" "	25	0	2	6	0	15	0	1	10	0
" "	50	0	5	0	1	10	0	3	0	0
" "	75	0	7		2	5	0	4	10	0
" "	100	0	10	0	3	0	0	6	0	0
For every other £50 or fractional part -	}	0	5	0	1	10	0	3	0	0

By sect. 98, sub-section 3, it is provided that no lease for a life or lives, not exceeding three, or for a term of years determinable with a life or lives not exceeding three, and no lease for a term absolute, not exceeding twenty-one years, granted by an ecclesiastical corporation, aggregate or sole, is to be charged with any higher duty than £1 15s.

Leases of mines or minerals, with or without any other lands or hereditaments, where any part of the produce is reserved in money or kind, are thus liable to duty. If the value of the reserved produce is stipulated to amount *at least* to a *given sum per annum*, or be limited not to exceed a given sum per annum, the duty is charged in respect of the highest of such sums given or limited for any year of the term. If a yearly sum is reserved in addition to such produce, without such stipulation or limitation, the duty is charged in respect of the yearly sum: and where both a certain yearly sum and also such produce, with such stipulation or limitation, the duty is charged upon the aggregate of the yearly sum, and also of the highest yearly amount or value of such produce.

A lease *not otherwise charged*, is subject to a duty of 10s.

Counterparts and duplicates of leases charged with a duty not exceeding 5s. are liable to the same duty as the originals, and counterparts of all other leases are liable to the duty of 5s.

All agreements for leases for not more than thirty-five years are to be charged as leases.

An instrument under seal, though it only amount

to an agreement for a lease, requires a stamp of £1 15s.

A licence in fee to work mines would appear to be chargeable in the same manner as an absolute conveyance, for it amounts to the absolute sale of an incorporeal hereditament. In other respects there seems to be no distinction between leases and licences.

In cases of doubt as to the proper stamp, any instrument may be submitted to the opinion of the Commissioners. The penalty in stamping an instrument is £10, and where the unpaid duty exceeds £10, interest thereon. But this may be remitted within twelve months by satisfying the Commissioners that the instrument was not duly stamped by accident, &c., without design to evade the duty. And a stamp may be affixed, on payment of the duty and penalty, even in the course of a trial.

Distinct mines may be leased by the same deed at different rents, and one stamp for the gross amount of the rent will suffice.

*Registry of Deeds.*—All deeds concerning estates in Yorkshire and Middlesex must be registered, except leases at rack-rents, and leases not exceeding twenty-one years, where the actual profession and occupation go along with the lease. But the exception of leases at rack-rents *does not apply to mines.*

## CHAPTER IV.

### TITLE BY PRESCRIPTION.

THE legal term “prescription” has been so frequently referred to, and it is a title so often relied upon for the acquisition and enforcement of rights connected with the occupation of collieries, that it is proposed to insert an outline of this description of title. Prescription is said to be a title by long usage. In other words, where any person, and those under whom he claims, have, to the knowledge of those against whom he asserts the right, been in the habit from time immemorial of using and exercising some incorporeal right, such as rights of way, of common, use of water, pews, &c. &c., and can show no other title to such right, he is said to claim and enjoy it by prescription. The notion which lies at the root of this title is, that if the owners of property permit, for a long course of years, adverse rights which tend to lessen their exclusive enjoyment of their own, it is reasonable to suppose that there must once have been a legal origin for such claim, and that the grant which conveyed it had been lost. Custom is a local usage; prescription is a personal usage, attaching to a man.

and his ancestors, or those whose estate he holds. Down to a very recent period, it was a necessary ingredient in this title that the usage should have been immemorial, that is must have existed beyond the memory of man, or so long that, as Lyttleton says, "no living witness has heard any proof, or had any knowledge to the contrary;" and, as another writer of authority says, "that there is no proof by record or writing, or otherwise, to the contrary." It was a maxim of the law that the time of legal memory meant the beginning of the reign of Richard the First. But though it was not necessary to prove the existence of the alleged usage from that time, and the exercise of it for a long period was said to raise the presumption that the usage had continued during the whole period of legal memory, yet it was sufficient to invalidate the title to show that it had commenced since the time of Richard the First.

The statute 2 & 3 Will. IV. c. lxxi., called an "Act for shortening the time of Prescription in certain cases," has greatly altered this theory. Its principal enactments, so far as they touch any right with which this treatise can be concerned, are the following.

Sect. 1 enacts that no claim which may be lawfully made at the common law by custom, prescription, or grant, to any right of common, or other profit or benefit to be taken and enjoyed from or upon any land of any person (except such matters as are specially provided for, and except tithes, rent, and services), shall, where such right, profit, or benefit shall have been actually enjoyed by any person



claiming right thereto, without interruption, for the full period of thirty years, be defeated by showing only that such right, profit, or benefit, was first taken or enjoyed at any time prior to such period of thirty years. Nevertheless, such claim may be defeated *in any other way* by which the same is now liable to be defeated. When such right, profit, or benefit shall have been so taken and enjoyed as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given, by deed or writing.

Sect. 2 contains an enactment concerning ways and other easements, and watercourses and the use of water. This enactment is exactly like that contained in sect. 1, which relates to rights of common, &c., except that it substitutes the period of twenty years for thirty years, and forty years for sixty.\*

Sect. 3 enacts to the same effect, as to the use of light for any dwelling house, &c.

Sect. 4 enacts that each of the respective periods of years above mentioned shall be taken to be the period next before some suit or action in which the claim or matter, to which such period may relate, shall have been or shall be brought into question; and no act or other matter shall be deemed to be an interruption without the meaning of the Act, unless it shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have

\* A right to lateral support from adjoining land was held by Lord Chancellor Selborne to be within this section. *Dalton v. Angus*, 6 App. Ca. 740.

had, or shall have, notice thereof, and of the person making or authorising the same to be made.

Sect. 6 enacts that in the cases provided for by the Act, no presumption shall be allowed in favour of any claim, upon proof of the exercise or enjoyment of the right or matter claimed, for any less period of time or number of years, than for such period or number mentioned in that Act, as may be applicable to the case and claim.

Sect. 7 enacts that the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an idiot, infant, non compos mentis, fême covert, or tenant for life, or during which any action or suit shall have been pending, and diligently prosecuted, or abated by the death of any parties thereto, shall be excluded in the computation of the periods therein-before mentioned, except in cases where the right or claim is by the Act declared to be indefeasible.

Sect. 8 enacts that when any land or water, over or from which any such way or other convenient watercourse, or use of water, shall have been or shall be enjoyed or derived, has been or shall be held under or by virtue of any term of life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter during the continuance of such term shall be excluded from the forty years, if the claim shall within three years next after the end, or sooner termination of such term, be resisted by any person entitled to any reversion on the termination thereof.

## CHAPTER V.

### FIXTURES.

THE word "fixture" has acquired the peculiar meaning of chattels which have been annexed to the freehold, but which are removable at the will of the person who annexed them. In the case of *Ex parte Barclay*, 5 De G. M. & G. p. 403, fixtures were defined to be "such things as are ordinarily affixed to the freehold for the convenience of the occupier, and which may be removed without material injury to the freehold; such will be machinery, using a generic term; and in houses, grates, cupboards, and other like things." By the expression "annexed to the freehold," is meant fastened to it or connected with it; mere juxtaposition, or the laying of an object, however heavy, on the freehold, does not amount to annexation. But whatever is so affixed becomes part of the realty, and the person who was the owner of it when it was a chattel loses his property in it, which immediately vests in the owner of the soil. It can only revert to the original owner of the chattel by severance and removal, by virtue of certain exceptions allowed by law. It is upon this

principle that in calculating the rateable value of property, machinery attached to it ought to be taken into account, without considering whether it be real or personal estate.

In its widest and natural sense the word fixture would mean anything annexed to the freehold. A privilege is conferred by law, as an exception to the general rule, upon certain fixtures, which, if set up for ordinary purposes, would not be severable from the freehold by the owner of a particular estate, or by his representative, but which, in order to encourage commerce, are removable when set up for commercial purposes. Such is the greater part of the machinery set up by manufacturers and traders, which is now of a description so expensive, that to prohibit its removal from a landlord's premises would be a serious discouragement to trade. By virtue of this exception the tenant of a colliery may now remove the engines, tram-plates, and machinery of all kinds, which have been erected and fixed for the use of the works, together with any merely temporary erections. But substantial buildings of brick and stone must be left, unless they are the subject of special stipulation. Such being the outline of the rule, it is necessary to consider further the various distinctions which have been established by the Courts.

Questions respecting fixtures principally arise between three classes of persons. 1st, between the heir and the executor of the same owner of the inheritance. In this case the rule prevails with the most rigour in favour of the inheritance, and against the right to sever and convert into a personal chattel any-

thing which has been affixed to the freehold. 2ndly, between the executor of a tenant for life, or in tail, and the remainder man, or reversioner; in which case the right to fixtures is more favourably considered for executors than in the case between the heir and the executor. 3rdly, between landlord and tenant, in which the greatest indulgence has always been allowed in favour of the claim to having any particular articles considered as personal chattels, as against the claim of the landlord.

In the two first classes the leading cases are *Lawton v. Lawton* (3 Atk. 13), which was the case of a fire-engine to work a colliery, erected by a tenant for life; *Lord Dudley v. Lord Ward* (Amb. 113), which was a similar case; and *Lawton v. Salmon* (1 H. Black. 259), which was an action brought for salt-pans by the executor against the tenant of the heir-at-law. The decisions have proceeded upon the ground that where the fixed instrument, engine, or utensil, and the building covering the same, was an *accessory to a matter of a personal nature*, it should itself be considered as personalty. The engines above mentioned were accessory to the carrying on the trade of getting and vending coals, a matter of a personal nature. Lord Hardwicke said in Lord Dudley's case, "A colliery is not only an enjoyment of the estate, but is in part the carrying on of a trade." And again he says in Lawton's case, "One reason that weighs with me is its being a mixed case between enjoying the profits of the land, and carrying on a species of trade, and considering it in this light, it comes very near the instances in brew-houses of furnaces and

coppers." Upon this principle the engines for raising coals were held to belong to the executor. And it may be stated as a general rule, that the representative of the particular tenant, *i.e.*, for life or in tail, is entitled against the remainder man to fixtures wholly or in part erected for the furtherance of trade.

#### LANDLORD AND TENANT.

But this question most usually arises between landlord and tenant. The original rule was that the tenant, if he had affixed anything to the freehold during his tenancy, could not again remove it without the consent of the landlord. But several exceptions have been engrafted upon this rule, amongst which the one with which alone this treatise is concerned is this: that utensils set up in connection with and relation to trade may be removed by the tenant. This exception was grounded upon the public policy of encouraging trade, which would otherwise have been materially checked. And the law was very clearly laid down by Lord Ellenborough in the case of *Elwes v. Mawe* (3 East, 38), to which case a most lucid commentary has been appended in *Smith's Leading Cases*, 5 Ed. vol. ii. p. 185. Besides the engines above mentioned, this general exception has been held to extend to a shed called a Dutch barn, set up for trading purposes, and having a foundation of brickwork and uprights fixed in and rising from the brickwork, and supporting the roof, which was made of tiles; and to a shed built on brickwork, and to posts and rails.

It is difficult, however, to say with perfect precision how far this exception or protection may be carried with respect to particular items. Generally, when articles can be removed without causing any serious detriment and mischief to the freehold, or when they can be taken away without being themselves entirely demolished, or without losing their value, the removal will be lawful. A building entirely of brick, therefore, could hardly be removed, though when it has a brick foundation, and the erection is mainly of wood, it may be removed. A steam-engine may be removed, and so may furnaces, and all kinds of machinery, and stoves. How far the removal of store-houses and workshops may be sanctioned by the Common Law Courts it is not possible to say, and must depend upon the nature of each item which may be the subject of dispute hereafter.

*Time for Removal.*—Where fixtures may be removed at all, it is incumbent upon the tenant to remove them before the end of the term, or within a reasonable time after the expiration of the term, as defined by James L. J. in *Ex parte Stephens re Lavies*, *infra*, p. 87. The injury done by the severance should be repaired, and the premises left in the state they were in at the commencement of the tenancy, if anything in the nature of a fixture has been substituted for another then affixed, and afterwards replaced. In illustration of this rule, and of the law generally, a few leading cases will be here referred to.

In the important leading case of *Minshull and another v. Lloyd*,\* a colliery had been leased with

\* 2 M. & W. 459.

the right of putting up engines, &c., subject to a right of re-entry on non-payment of rent or insolvency. Certain engines were erected and affixed to the soil. The tenant afterwards assigned the property to trustees to secure an annuity. The landlord in June 1829 recovered possession by ejectment, and in the following November an execution creditor of the tenant who had so assigned seized the engines, &c., under a writ of *fi. fa.* The trustees then sought to recover the steam-engines in trover. It was held they could not do so, on the ground that the tenant had not severed them during his term. Mr. Baron Parke stated the law very clearly as follows: "We take these engines to have been in part affixed in a substantial manner to the freehold, in the ordinary way in which steam-engines are erected. The law is clearly settled that everything substantially and permanently affixed to the soil is in law a fixture. The principle of law is that *quicquid solo plantatur solo cedit*. The right of a tenant is only to remove during his term the fixtures he may have put up, and so to make them cease to be any longer fixtures. That right of the tenant enables the sheriff to take them under a writ for the benefit of the tenant's creditor. I assent to the doctrine laid down in *Coombs v. Beaumont* (B. & Ad. 72), that such fixtures are not goods and chattels within the bankrupt law, though they are goods and chattels when made such by the tenant's severance, or for the benefit of execution creditors. These engines were never goods and chattels at all, so as to pass to the plaintiffs. They had only the same right of removal as the tenant, which ceased in June 1829, and that right of removal would



not have enabled the tenant to sue in trover for them even during his term."

In *Ex parte Stephens re Lavies*, 7 Ch. D. 127, Lord Justice James stated the law as follows: "The law is clearly settled that the right of a tenant to fixtures is a qualified right. It is a right to have the fixtures if he removes them during his term, or during a certain time after its expiration, something which may be called an enlargement of the term, or to use the words of Baron Parke, an excrescence on the term, during which the tenant has a right to consider himself as still in possession of the premises as tenant under the landlord."

*Distrainable Fixtures*.—In the case of *Hellawell v. Eastwood and others* (6 Ex. Rep. 295), it was held that machinery for the purpose of manufacture (*ex. gra.*, mules for spinning cotton, fixed by screws into the wooden floors of a factory, or in some cases sunk in the stone flooring and secured by lead) is by law distrainable for rent. At common law, things fixed to the freehold could not be distrained for two reasons; that what is part of the freehold cannot be severed without detriment to the thing itself, and things which cannot be restored in the same plight and condition cannot be distrained for rent. The Court, therefore, considered whether these mules fell under either of these heads, as otherwise they were not protected. They held that not being perishable, they were not within the last category, and the only question was whether they were, when fixed, part of the freehold. This is a question of fact, depending on the circumstances of each case, and chiefly on the consideration whether the

mode of annexation was such that the article could be removed *integre, salve, commode*, without injury to itself or the building, and whether it was for the *permanent* and substantial improvement of the building, or merely for a temporary purpose. They held that the mules never became part of the freehold. They were slightly attached, and would have passed to the executor; they never ceased to have the character of moveable chattels, and were therefore liable to be distrained. It seems that the case was decided on the principle that articles of this kind included in this case are not fixtures at all; that they never changed their legal character of chattels belonging to the tenant, but were merely to be regarded as so much furniture.

A more recent case on this branch of the law is *Taylor v. Cameron*, L. R. 5 Q. B. 306. Three railways were connected with a coal mine, one within the mine, one within a yard attached to the colliery, and the third extending from the yard and effecting a junction with a public railway. The lessee of the mine had mortgaged it to the plaintiff, who had entered into possession. The rent being in arrear, the lessor distrained, among other things, the three railways. The railways were constructed in the following manner: The surface of the ground was prepared by having ballast spread upon it; sleepers were then embedded in the ballast and the ballast packed, and the rails were fastened to the sleepers by nails. In order to remove the rails they were wrenched off the sleepers by means of bars and picks; and to remove the sleepers it was necessary to loosen the ballast by means of picks, and then with

levers to raise them. The removal of the sleepers made holes in the ballast. The Court upon these facts held that the railways, by their mode of annexation to the soil, became fixtures, and were not distrainable.

But in the case of *Boyd v. Shorrock* (37 Law Journ. Chan. 144), it appeared that the tenants of a cotton mill set up some looms, and fastened them to the floor by means of nails driven through the loom feet into wooden plugs fitted into the floor. They mortgaged the mill, with the looms and other machinery, without a bill of sale, and became bankrupt. The looms were claimed by the assignees and the mortgagees. The present Lord Chancellor, Lord Hatherley, then sitting as Vice-Chancellor, said: "The principle seems to be that if the tenant has affixed to the freehold, during his tenancy, articles in such a manner as to make it appear that during the term they are not to be removed, and that he regards them as attached to the property, according to his interest in the property, then, on any dealing by him with the property to which these articles are affixed, the Court will presume that he meant to deal with the property, as it stood, with all these things so attached, and to pass the property in its then condition. The circumstance that they may be placed more conveniently in another part of the building, does not, I think, prevent their being machinery within the decision in *Ex parte Barclay* which I followed in *Mather v. Fraser* (2 K. & J. p. 536). I must hold that these are fixtures which passed with the property, and did not, therefore, require a bill of sale." The rule laid down in this case was subsequently overruled by other

cases, but is again good law by virtue of sect. 7 of Bills of Sale Act, 1878.

In another recent case, *Climie v. Wood* (L. R. 3 Ex. 287, on appeal, L. R. 4 Ex. 328; 37 Law Journ. Ex. 158), an engine and boiler were erected, the engine screwed down to planks, and the boiler fixed in brickwork. The question arose as to these articles (which which were found by the jury to be fixtures) whether as between mortgagor and mortgagee trade fixtures are removable by the mortgagor. Chief Baron Kelly said that if this “were a question between landlord and tenant, there is no doubt the defendant might lawfully remove the engine and boiler. But no authority has been cited to show that the mortgagor is entitled to remove such trade fixtures as against the mortgagee. There have been several cases where the Courts have decided that upon the true construction of the mortgage deed trade fixtures were removable by the mortgagor, but not one to show that such rights existed without a special provision. The old maxim, *quicquid plantatur solo cedit solo*, applies in all its integrity to the relation of mortgagor and mortgagee, and trade fixtures form no exception.” And where a silk mill was mortgaged, and the deed stated that “all those the steam-engine or steam-engines, boilers, steam pipes, main shaftings, mill-gearing, mill-wrights’ work, and other machinery and fixtures whatsoever then erected or set up, or standing, or being, or which should at any time thereafter be erected or set up, or stand or be in or upon the said lands, mill, and premises, or any part thereof,” were to be included in the mortgage, it was held that *all* the machinery and

fixtures used in the manufacturing of silk within the mill were included, and not only the machinery necessary to give motive power to the mill. (*Haly v. Hammerly*, 30 Law Journ. Chan. 771.)

In the case of *Penton v. Robart* (2 East, 89), it would seem that the mere erection of a chimney would not prevent the right, which would otherwise have existed, of removing the surrounding building. And in another case it was even questioned whether the tenant could remove a lime-kiln substantially built of brick and mortar, but the point was not decided.

It sometimes happens that the tenant's right does not depend altogether upon the general law, but is extended by a special custom or *lex loci*. See *Culling v. Tuffnell* (Buller's N.P. 34). But to whatever extent the right to remove trade fixtures may be carried, common sense and justice unite in requiring that it should be bounded by the rule laid down by Lord Hardwicke in *Lawton v. Lawton* (3 Atk. 13), namely, that the principal thing shall not be destroyed by the accessory. "It may perhaps be deduced from this," says Mr. Smith, "that if a trading fixture could not be removed without the destruction or the great and serious injury of some important building, it would be irremovable. But when the building is but an accessory to the fixture, such as an engine-house, and built to cover it, there we have the authority of the great case of *Elwes v. Mawe* for saying that one as well as the other is removable."

In questions as to fixtures arising between vendor and vendee, upon a sale of the freehold, fixtures attached to it will pass in the absence of any express

provision to the contrary. As between the mortgagor and mortgagee there seems to be no reason that a mortgage of lands should pass any different rights with respect to fixtures than a conveyance.

Since the last edition, in which the last sentence appeared, the case of *Meux v. Jacob* (L. R. 7, H. L. 481) has been decided. There it was held "a mortgage of premises will pass the fixtures upon the premises. A mortgage of a lease made by the lessee will carry the fixtures of that property which is in lease, and the power to remove which fixtures was in the tenant. Fixtures attached by the mortgagor to the property after the date of the mortgage, will also (unless under special stipulations) pass to the mortgagee. There is no difference in this respect between a mortgage in fee by a freeholder and a mortgage by way of assignment of a term by a leaseholder."

In all cases it must be understood that the law of fixtures must yield to any express stipulation counter-vailing it. This is now the customary course adopted in leases of collieries. An arrangement is made by which the landlord has the option of purchasing the tenant's fixtures at a valuation, and if he declines the tenant may proceed to remove them. In the form of a colliery lease inserted in the Appendix, an arrangement of this kind will be found. But even under such provisions, disputes will sometimes arise upon items which have not been specially named.

Contracts for the sale of fixtures are not within the Statute of Frauds.

The case of *Foley v. Addenbroke* (14 Law Journ.

4, 169), is instructive on this subject. The defendant was lessee of some iron mines, works, and furnaces. The lease contained a proviso that at the end of the term, the lessors, on giving six months' previous notice in writing of their intention whether they would purchase or not, to the defendant, should have the option of purchasing the iron castings, railways, gins (or windlasses), wimseys, boilers, machines, and moveable implements and materials then in use, or being in and about the furnaces, fire-engines, iron-works, stone-pits, lands, and premises, at a price to be determined in the manner specified; and in the event of their neglecting to avail themselves of the option, the defendant might remove all such articles as described above. The plaintiffs did not avail themselves of the option or give the notice, and the defendants, before the lease expired, disannexed from the freehold and took away a variety of articles, and in so doing injured the furnaces and iron-works. In delivering the judgment of the Court of Exchequer, Lord Chief Baron Pollock said as to this point: "The rule which the Court thinks the correct one to act upon is this, that whatever was in the nature of a machine, or part of a machine, as ironwork or iron casting, or railways, gins, or moveable implements, or materials, the defendants had a right to remove; that whatever was in the nature of buildings, or support of buildings, although made of iron, the defendants had not a right to remove, and that with respect to damage to the brickwork, the defendants were not bound to restore the brickwork in a perfect state, as if the article it was intended to protect, or

support, or cover, were there ; it was sufficient for the defendants to exercise their right to remove what the lease gave them authority to remove, and in doing so, to remove the brickwork, and to leave it in such a state as would be most useful and beneficial to the lessors, or to those who might next take the premises." The Court then proceeded to dispose of the various items one by one. They were of opinion that the tenants might remove the boilers, the boiler grates, the castings and ironwork of the engine and regulator, and the spring beams. As to the damage sustained by the removal of these articles, if it meant damage to the brickwork connected with them, the Court thought they were not sufficiently informed as to the manner of removal. The only rule they could lay down was that the tenants had a right to remove them, *doing as little damage as possible*, and leaving the premises in a state fit to be used for a similar purpose by another tenant. Then as to the brickwork of the hot-air apparatus, if it was merely disturbed for the purpose of taking that apparatus which the tenant had a right to take, and being so disturbed was left in a condition fit and convenient for the restoration of another hot-air apparatus by another tenant, then no damages ought to be recovered. The next item was the valve piping, which they thought the tenants entitled to remove. The next item was the damage done to the furnaces by the removal of the hoops, beams, and brick-staffs. The Court thought that the lessors were entitled to recover damages for the removal of these, because these articles were not ironwork in the



nature of machines or implements, but were ironwork *substituted for additional* brickwork, with a view to give additional, and probably necessary, strength to the furnace, which the defendants had no right to remove or to deteriorate. They thought the tenants might remove the cupola, and the blast-pipes which worked them. They might also remove the puddling furnaces, the mill furnaces, the boilers of the forge-engine, the grates of the boilers, and the castings and ironwork, of the forge-engine, but the tenant might not remove the oak taken from the foundation of the forge-hammer. The tenants might remove the plates from the shears foundation, but the lessors might recover damages for any improper method of removal. They might also remove the holding-down pins and the bed plates. With regard to the cast-iron columns used for the support of the building, the Court thought they were not within the exception in the lease, and ought not to be taken away, but that the tenants might remove the gasometer and apparatus. If any unnecessary and wanton damage had been done, and the premises left in such a state as not to be conveniently applicable to the same purpose, to that extent the lessors would be entitled to recover damages.

Though this case and judgment furnishes a good guide under similar circumstances, it must be distinguished from ordinary disputes relating to the removal of fixtures. This case turned upon the special provisions of the particular lease. But as colliery leases very generally contain provisions of a similar nature, the opinion of the Court is given very fully.

Under the Bankruptcy Act, 1869, it was held that after a disclaimer the trustee could not remove any fixtures ; and that where he had removed or disposed of them before disclaiming he was bound to restore them or pay the proceeds to the landlord, but where there was a provision in a lease that the lessee should have a certain time after the determination of his term to remove fixtures, the trustee was held entitled to remove fixtures notwithstanding he had disclaimed the lease.

By the Bankruptcy Act of 1883, it is provided by the 3rd sub-section of sect. 55 that before the Court gives leave to a trustee to disclaim, it may "require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such orders with respect to fixtures, tenant's improvements, and other matters arising out of the tenancy as the Court thinks just."

Fixtures were held not to be within the doctrine of reputed ownership under the last Bankruptcy Act, nor are they under the Bankruptcy Act of 1883.

The Bills of Sale Act, 1878, requires all assignments of fixtures when separately assigned or charged to be registered as bills of sale. But assignments of fixtures (except trade machinery as defined by sect. 5), when assigned together with a freehold or leasehold interest in any land or building to which they are affixed, do not require registration. All assignments of "trade machinery" as defined by sect. 5 require registration.

By sect. 7 no fixtures shall be deemed to be separately assigned or charged, by reason only that they are assigned by separate words or that power is given

to sever them from the land or building to which they are affixed, without otherwise taking possession of or dealing with such land or building, if by the same instrument any freehold or leasehold interest in the land or building to which such fixtures are affixed, is also conveyed or assigned to the same person or persons.

By sect. 5 "trade machinery" for the purposes of the Act means the machinery used in or attached to any factory or workshop :

1st. Exclusive of the fixed motive powers, such as the water-wheels and steam-engines, and the steam boilers, donkey engines, and other fixed appurtenances of the said motive powers ; and

2nd. Exclusive of the fixed power machinery, such as the shafts, wheels, drums, and their fixed appurtenances which transmit the action.

3rd. Exclusive of the pipes for steam, gas, and water in the factory or workshop.

"Factory or workshop" means any premises on which any manual labour is exercised by way of trade or for purposes of gain, in or incidental to the following purposes or any of them ; that is to say : (a) To the making any article or part of an article ; (b) to the altering, repairing, ornamenting, or finishing any article ; (c) or to the adapting for sale any article.

Sect. 8 of the Bills of Sale Act, 1882, requires a bill of sale to be attested and registered within seven days after the execution thereof, otherwise it is void in respect of the personal chattels comprised therein.

## CHAPTER VI.

### PRIVATE WAYS, AND WAY-LEAVES.

It is obvious that the work of collieries can only be carried on without private rights of way in those cases where the land over which the produce is conveyed to the railway, canal, or public road, is the property of the occupier of the colliery. As this is not usually the case, the subject of private ways and way-leaves is one of considerable importance.

The distinction between public and private ways is this: public ways are open to all persons; private ways are enjoyed by particular persons or classes. The general rules of law with respect to private ways are these: A private right of way belongs to the class of easements, which are a division of incorporeal rights. An easement is a right annexed to, or issuing out of, or exercisable over or within an hereditament corporeal. The right of way is the right, in one person, or more, of passing over the land of another person. There are five kinds of way—footways; horseways, for persons passing on horseback; driftways, for driving cattle; carriage ways, for carts and

carriages, including always a foot and horseway ; and lastly, waterways for ships and boats.

The proper origin of a private right of way is a grant from the owner of the soil, as when by deed the owner of the land bestows on another the liberty of passing over his grounds to go to market, &c. This right may also be gained by prescription, as where all the owners and occupiers of such a farm have been used to cross such a ground for such a particular purpose. The rule of law as to this mode of acquiring the right is settled by 2 & 3 Will. IV. c. lxxi. s. 2, which enacts that “in claims of right of way by prescription, when the way shall have been actually enjoyed for full twenty years without interruption, it shall not be defeated or destroyed, only by showing that such right was first enjoyed at any time prior to such period of twenty years ; but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated ; and where it has been enjoyed for full forty years the right shall be absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.” Prescription is a title by long usage, and though it depends on usage, it is distinguishable from custom in this, that custom is a *local* usage, and prescription is a *personal* usage, attaching to a man and his ancestors, or those whose estate he has. But it is important to observe that this title is always founded on the *actual usage* of enjoying the thing in question, and without this use and enjoyment, a mere bare claim, however often

repeated, or long continued, and whether its validity had been questioned or not, will not suffice to establish a prescriptive right.\* The enjoyment must have been constant and peaceable, of the duration required by the statute, certain and not vague in its nature; and is only capable of giving a title to supply the loss of a supposed grant, which conveys incorporeal rights.

A private right of way may also be established by proof of a custom, if such can be shown to have prevailed for a sufficient length of time with respect to *all* the inhabitants of a certain parish, village, hamlet, district, &c. The immemoriality of a local custom may be sufficiently proved by living witnesses, who can attest its continued existence for a long time back. The general rule is that if the exercise of a custom at a distant time be shown, and there is no evidence that at any certain time it did not exist, a jury may properly infer that it went back as far as the time of Richard I., which is the time of legal memory. But as rights of way to and from collieries are rarely, if ever, dependent on custom, this branch will not be more particularly considered.

A right of way may also arise from necessity. Thus, if a man grants to another a piece of ground in the middle of his field he at the same time tacitly and impliedly gives him a way to come at it, for that is necessary to its enjoyment, and that grantee may cross his land for that purpose without trespass. For when the law gives a right it gives every-

\* Stephens' Black. 2, 35.

thing necessary to its exercise.\* This right of way thus impliedly granted or reserved, is called "a way of necessity." But a "way of necessity" is limited by the necessity which created it, and when such necessity ceases, the way also ceases.

In the two former classes of ways, where grants are actually in existence, or are presumed from usage and custom to have been originally made, though now lost, the right of way so given may be either *appurtenant* to some particular house or land, or "in gross," and annexed to the person of the grantee, without respect to any house or land of which he may be the owner or occupier.

If a grant of a right of way be made by a person who has only a *limited* estate in the land over which the way passes, it is effectual only during the continuance of the estate of the grantor. Suppose a claim to a right of way to be set up by a prescriptive title, and enjoyment of it for twenty or forty years be proved, yet if it appears that the land over which such right is claimed has, during the whole or part of the twenty or forty years, been in the occupation of a party who had only a *limited* estate in it, not only is no right of way acquired against the reversioner, but no right whatever is gained by the user.

The leading cases upon points arising in connection with claims to private rights of way are the following: Under the grant of a "free and convenient way," with liberty to make and lay causeways for the purpose of carrying coals, the grantee was held to have the right

\* 1 Saund. Wms. 323. Step. Black. 2, 11.

to lay a framed waggon way.\* But it was also held that he had no right to make a transverse road, *across* the land, under a grant which gave a right of way in, through, and along it, the land consisting of a narrow strip.

In a much later case it appeared that land was conveyed, excepting and reserving all mines of coals within that land, together with sufficient way-leave and stay-leave to and from the said mines, with liberty of digging and sinking pits. The question was raised whether under this reservation of a sufficient way-leave, the coal owner had now a right to make a railway for the purpose of carrying the coals from the mines for shipment, with cuttings and embankments, and fenced in so as to exclude the owner of the soil. It was held, however, that the right of the coal owner was not confined to such ways as were in use at the time of the grant. The judgment of the Court in this case was delivered by Mr. Baron Parke, who observed (after disposing of several other points): "This reservation is to be construed, according to the rule laid down in *Shepherd's Touchstone*, 100, in the same way as a grant by the owner of the soil of the like liberties, 'for what will pass by words in a grant will be excepted by like words in an exception.' Now the reservation is of the right to dig a pit or pits, and of *sufficient* way-leave and stay-leave connected with those pits. There is no doubt that the object of the reservation is to get the coals *beneficially* to the owner of them, and therefore it should seem that there passes by it a right to such a description of way-leaves, and in

\* *Seahouse v. Christian*, 1 T. R. 560.



such a direction, as will be reasonably *sufficient* to enable the coal owner to get, from time to time, all the seams of coal to a reasonable profit ; and therefore the owner is not confined to such description of way as is in use at the time of the grant, and in such direction as is then convenient. It is found that without a railway for shipment the lower seams could not be worked without loss. We cannot say that there has been anything improper in the direction or mode of construction of the railway. The true question is whether the entire railway is convenient." \*

The following case (*Bidder v. North Staffordshire Railway Company*, 4 Q. B. Div. 412) may assist the reader in some peculiar circumstances. The owner of land and of the minerals under it, conveyed by deed the surface to another, but excepted out of the conveyance a waggon or cart road of eighteen feet in width, which the said owner was to repair at his own cost. He proceeded to lay down a railway or tramway for the carriage of coals from neighbouring collieries belonging to him. Lord Justice Bramwell said, "The excepted road is not for the work of the mines. On the contrary, the mines are not to be worked from the land conveyed. It is not a road in any place convenient for the mines ; but it is a road in a defined place . . . very useful for ordinary purposes to connect the southern parts of the said owner's land. A tramway involving (as this does) the raising or lowering of the level of the road cannot be within the reservation, nor a railway which would take up the whole width and be dangerous."

\* *Dand v. Kingscote*, 6 M. & W. 174.

In the recent case of *Bradburn v. Morris* (3 Ch. Div. 812), it was held that user for twenty years of a way in a field, used only for agricultural purposes, does not give a right of way for mineral purposes.

There are a few other points in connection with private rights of way which may be briefly noticed. Under a right of way over a close to a particular place, a man cannot justify going beyond that place. Nor is it any answer to an action in trespass that the defendant has a right of way over part of the plaintiff's land, and that he had gone upon the adjoining land because the way was impassable from being overflowed by a river; for he who has the use of a thing ought to repair it; and for anything that appeared the overflowing might have happened by the neglect of the defendant, who, it did not appear, had no other road.\* Unity of possession operates to extinguish a right of way by prescription; in other words, if the party entitled to a right of way becomes the owner of the land over which it passes, the right of way is extinguished if the party has the *same extent of interest* in the land and in the way. But if the one be held for an estate different in extent of duration from the other, the right is only *suspended* during the union of the two interests. Even where a right of way is extinguished by unity of possession, it will in some cases revive upon a severance of that unity, as by partition among the parceners, &c. The particular rights of the grantor of a private way continue to exist, although the owner of the land may have dedicated it to the public as a highway.

\* *Taylor v. Whitehead*, 2 Doug. 745.

By the general Inclosure Act, all roads, public and private, within the district, not set out by the commissioners, are declared to be extinguished.

The grantee cannot throw the burden of repairing the way upon the grantor, unless by the terms of the grant, as proved by the deed or by usage, the grantor has engaged to enable the grantee to use the way.

If the occupier of the land over which a private way passes, or any other person, obstruct the way, the party entitled to the way may remove the obstruction, and he may also bring an action on the case, or in some cases, an action of covenant against the obstructor. On the other hand, if the occupier of the land resisting the claim of a right of way bring an action of trespass against the person exercising the alleged right, the defendant may plead in justification a title founded on prescription, grant, reservation, or statute.

If a person agree for a lease of a way-leave, at a yearly rent, and if, afterwards, without any fault either of the proposed lessor or lessee, events happen which would render the proposed way-leave useless, a specific performance will not be decreed.\*

These are the leading rules which settle the rights connected with ways on the surface. The words of the Act for shortening the time of prescription, as it affects rights of way, will be found under that head. A form of the lease of a way-leave is also inserted in the Appendix. As to way-leaves underground, they are generally made the subject of special stipulation, and in consequence, it is presumed, of this practice, there has been comparatively little litigation on the

\* White's case, 3 Swanst. 108.

subject, and few leading cases can be brought forward upon any peculiar points arising out of disputes under this head. A recent case upon this subject is *Phillips v. Homfray and Fothergill v. Phillips* (L. R. 6 Ch. 770). In that case the owners of a colliery entered into a contract with an adjoining landowner for the purchase of his estate, without disclosing the fact of which he was ignorant that they had without authority gotten a considerable quantity of coal from under it. The Court of Appeal declined to enforce the contract at the suit of the purchasers, though the sale was not shown to be of an undervalue, and held in a suit by the landowner that the landowner was entitled to the value of the coals gotten under his land, with an allowance for raising, but none for getting, and to compensation in the way of way-leave and royalty for all minerals gotten by the defendants from their own mines and carried under his land.

## CHAPTER VII.

### RIGHTS CONNECTED WITH THE FLOW OF WATER.

By the law of England water flowing in a stream is *publici juris*, that is to say, a thing the property in which belongs to no individual, but the use of it to all. An individual can only acquire a right to it, by applying so much of it as he requires for a beneficial purpose, leaving the rest to others, who, if they acquire a right to it by subsequent appropriation, cannot lawfully be disturbed in the enjoyment of it. *Primâ facie* the proprietor of each bank is the proprietor of half the land covered by the stream, but there is no property in the water itself. Every proprietor has an equal right to use the water. Consequently, none can have the right of using the water to the prejudice of another, nor can he lawfully diminish the quantity which would otherwise descend to those below, nor throw back the water upon those above, unless he has a grant or licence from the persons affected by such acts, or by proving an uninterrupted enjoyment of such right for twenty years. This period of twenty years has been adopted in the statute 2 & 3 Will. IV. c. lxxi., for shortening the time

of prescription in certain cases. The second section enacts that "no claim to any watercourse, or the use of any water, where such shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated by showing only that it was at first enjoyed at any time prior to such period; but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such shall have been enjoyed for the full period of forty years, the right shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing." For the other enactments or provisos of this statute the reader is referred to the chapter on Prescription.

After the erection of works, and the appropriation by the owner of the land of the water flowing over it, if a proprietor of other land afterwards takes what remains of the water before unappropriated, the owner above, whatever he might have done before, cannot afterwards appropriate more to himself than he had done.\*

The exclusive right to a flow of water once acquired can only pass by grant as an incorporeal hereditament. A licence, verbal or otherwise, to use or take the water at any place, may be revoked, even without an express power of revocation being reserved, unless works have been constructed and expenses incurred on the faith of it.†

\* *Bealy v. Shaw*, 6 East, 208.

† *Mason v. Hill*, 5 B. & Ad. 1.

No proprietor of the banks of a stream has a right to diminish the quantity or injure the quality of the water, to the detriment of other owners on the other parts of the banks. If he does so, the remedy is by way of an action on the case for the special injury. For in such a case the plaintiff must be able to show either that some benefit arose to him from the water going through his land, of which he has been deprived, or at least that some deterioration was occasioned to the premises by the abstraction of the water. If the proprietor can thus show that he is injured by the diversion of the water, it is no answer to the action to show that the defendant was the first person who appropriated it to his own use, unless he has had twenty years' undisturbed enjoyment of it in its altered course. In short, any appropriation of water which injures any other proprietor, must be set up by grant or prescription, and until so established may be successfully resisted.\* But the alleged injury must not be imaginary. If the water be deprived of noxious matter (produced by a discharge of such matter into it above), before it reaches the land of an owner below, there can be no ground for action.†

If water be heated, and sent down to a proprietor below in that heated state, a sufficient injury is thereby incurred to form the ground of an action.‡ But undoubtedly the right to disturb flowing water and render it noxious by the washing of minerals, or to alter the rate of its current, or to divert and discharge

\* *Bealy v. Shaw*, 6 East, 208.

† *Elmhirst v. Spencer*, 2 Mac. & G. 45.

‡ *Mason v. Hill*, *supra*.

it lower down, may be acquired by uninterrupted user.\*

In the case of *Acton v. Blundell* (12 M. & W. 324), it was held that the owner of land through which water flows in a *subterraneous* course, has no right or interest in it which will enable him to maintain an action against a landowner who, in carrying on mining operations in his own land in the usual manner, draws away the water from the first mentioned owner and lays his well dry; the well having been sunk within twenty years from the commencement of the action, and therefore no title having been acquired by user and prescription. A vast amount of learning was brought to bear in the discussion of this leading case, which is a very important one. The plaintiff had brought his action for the disturbance of certain underground springs, streams, and watercourses, which he said ought of right to flow and percolate into his closes for supplying certain mills with water. He further complained of the draining off of a spring or well of water, in a close of his, by the possession of which close, as he alleged, he ought, of right, to have the benefit and enjoyment of that spring or well. The defendants denied the alleged rights. It was proved *that within twenty years from the commencement of the action*, a former owner and occupier of the plaintiff's land had sunk a well in that land in order to raise water to work his mill, and that the defendants about sixteen years afterwards had sunk a coal-pit about three quarters of a mile from the plaintiff's well, and three years afterwards sunk a second, at a less distance,

\* *Wright v. Williams*, 6 M. & W. 77.



the consequence of which two sinkings was that the supply of water was rendered insufficient for the purposes of the mill. The question raised was whether the right to the enjoyment of an underground spring, or of a well supplied by such a spring, is governed by the same rule of law as that which applies to a watercourse flowing on the surface. Lord Chief Justice Tindal, in delivering the judgment of the Court in error, said, "The rule of law which governs the enjoyment of a stream flowing in its natural course over the surface of land belonging to different proprietors is well established. Each proprietor of the land has a right to the advantage of the stream flowing in its natural course over his land, to use the same as he pleases for any purposes of his own not inconsistent with a similar right in the proprietors above and below, so that neither can any proprietor above diminish the quantity or injure the quality of the water which would otherwise naturally descend, nor can any proprietor below throw back the water without the licence or the grant of the proprietor above. And if the right to the enjoyment of underground springs or to a well supplied thereby is to be governed by the same law, then the defendants could not justify the sinking of the coal-pits.

"But we think that there is a marked and substantial difference between the two cases. The ground and origin of the law which governs streams running in their natural course would seem to be this: that the right enjoyed by the several proprietors of the lands over which they flow is and always has been

public and notorious; that the enjoyment has been long-continued and uninterrupted, each man knowing what he receives and what has always been received from the higher lands, and what he transmits and what has always been transmitted to the lower. The rule therefore either assumes for its foundation the implied assent and agreement of the proprietors of the different lands from all ages; or perhaps it may be considered as a rule of positive law.

“But in the case of a well sunk by the proprietor in his own land, the water which feeds it from a neighbouring soil *does not flow openly* in the sight of the neighbouring proprietor, but through the hidden veins of the earth beneath its surface. No man can tell what changes these underground sources have undergone in the progress of time. It may well be that it is only yesterday's date that they first took the course and direction which enabled them to supply this well. Again, no proprietor knows what portion of water is taken from beneath his own soil, how much he gives originally, or how much he transmits only, or how much he receives. On the contrary, till the well is sunk and the water collected into it, there cannot properly be said, with reference to the well, to be any flow of water at all. In the case therefore of the well, there can be no ground for implying any mutual consent or agreement, for ages past, between the owners of the several lands beneath which the underground springs may exist, which is one of the foundations on which the law as to running streams is supposed to be built; nor, for the same reason, can any trace of a positive law be inferred from long-continued

acquiescence and submission, whilst the very existence of the underground springs, or of the well, may be unknown to the proprietors of the soil.

“ But the difference of the two cases with respect to the consequences, if the same law is applied to both, is still more apparent. In the case of the running stream the owner of the soil merely transmits the water over its surface ; he receives as much from his neighbour above as he sends down to his neighbour below ; he is neither better nor worse ; the level of the water remains the same. But if the man who sinks a well in his own land can acquire by that act an indefeasible and absolute right to the water that collects in it, he has the power of preventing his neighbour from making any use of the spring in his own soil which shall interfere with the enjoyment of the well. He has the power still further of debarring the owner of the land in which the spring is first found, or through which it is transmitted, from draining his land for the proper cultivation of the soil, and this by an act which is voluntary on his part, and which may be entirely unsuspected on the part of his neighbour. He may impose on such neighbour the necessity of bearing a heavy expense, if the latter has erected machinery for the purpose of mining, and discovers when too late that the appropriation of the water has already been made. The advantage on one side and the detriment on the other may bear no proportion. The well may be sunk to supply a cottage, or a drinking place for cattle ; whilst the owner of the adjoining land may be prevented from winning metals and minerals of inesti-

mable value. And, lastly, there is no limit of space within which the claim of right to an underground spring can be confined: in the present case, the nearest coal-pit is at the distance of half a mile from the well. It is obvious that the law must equally apply if there is an interval of many miles."

The Court of Error for these reasons decided that the case did not fall within the rule which obtains as to surface streams, and that it was not to be governed by analogy therewith. But at the close of this judgment the Court added, "We intimate no opinion as to what might be the rule of law if there had been an uninterrupted user of the right for more than the last twenty years, but, confining ourselves to the facts stated, we think the present case is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the soil may dig therein, and apply all that is found there to his own purposes, at his own free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to him falls within the description of *damnum absque injuriâ*, which cannot become the ground of an action."

Although the Court reserved their opinion if a user of this well for upwards of twenty years had been proved, yet undoubtedly the course of the

reasoning, and the spirit and tenor of the judgment, are against the acquisition of any such right.

The later cases on this subject are those of *Embrey v. Owen* (20 Law Journal, Ex. 212), in which an action was brought by the occupier of a mill against the defendant for diverting part of the water for the irrigation of his land above. It was proved that this diversion was not continuous, but only intermittent, and except a small quantity which was absorbed in irrigation, it was returned again to the stream, without causing any diminution of water cognisable by the senses. The Court of Exchequer decided that as no damage was done to the working of the plaintiff's mill, and as the diminution of water was not perceptible, the irrigation was a reasonable use of the water, and was not an infringement of the plaintiff's right in respect of his mill. But care is taken in this judgment to show that an action may be maintainable for the infringement of a right, though there is no actual damage sustained.

Another case is that of *Sampson v. Hoddinot* (26 Law Journal, C. P. 148). In that case the defendant also possessed a mill on a stream, and he had not only used the water for his mill, but had latterly diverted it for the purpose of irrigating his meadows. The plaintiff had been accustomed to irrigate his own meadows by the same stream. It appeared that by the acts of the defendant the water flowing down to the plaintiff was not sensibly diminished in quantity, but it arrived later in the day, and he was thus prevented from using it as beneficially as he otherwise would. The Court held that the

defendant had by the irrigation of his meadows detained the water for a time, and in a manner *necessarily injurious* to the natural right of the plaintiff, and that the latter was entitled to maintain his action.

In another case, *Dudden v. Guardians of the Clutton Union* (26 Law Journal, 146), the Court of Exchequer decided that a person has no right to take water from a spring-head where it rises from the ground, so as to obstruct its flowing into its natural course and stream, to the injury of owners on the banks. The defendants had done this by tanks placed close to a spring, to the injury of the owner of a mill below. The Court of Exchequer held that a stream may be said to begin at the spot where the water rises to the surface, and that a person is not justified in diverting it as it springs from the ground, and that the action was therefore maintainable.

Still more recently, in the case of *Chasemore v. Richards* (29 Law Journal, Ex. 81), the House of Lords decided that an action is not maintainable against a person who, by digging a well, cuts off water from a stream which would otherwise have flowed into it. The rules applicable to the enjoyment of a natural stream do not apply to underground water, not proceeding in any defined course, but percolating through the strata in all directions, and ultimately reaching some stream. In such a case the owner may dig and intercept such water, though the flow of the stream be sensibly affected thereby, and though the water is taken not for the use of the owner's own land, but for extraneous purposes, and to an enormous extent.

In delivering the unanimous opinion of the judges in the House of Lords, Mr. Justice Wightman said (*inter alia*):

“The question is, then, whether the plaintiff has such a right as he claims *jure nature* to prevent the defendant sinking a well in his own ground at a distance from the mill, and so absorbing the water percolating in and into his own ground beneath the surface, if such absorption has the effect of diminishing the quantity of water which would otherwise find its way into the river Wandle, and by such diminution affect the working of the plaintiff’s mill. It is impossible to reconcile such a right with the natural and ordinary rights of landholders, or to fix any reasonable limits to the exercise of such a right. Such a right as that contended for by the plaintiff would interfere with, if not prevent, the draining of land by the owner. Suppose, as it was put at the bar in argument, a man sank a well upon his own land, and the amount of percolating water which found its way into it had no sensible effect on the quantity of water in the river which ran to the plaintiff’s mill, no action would be maintainable; but if many landowners sank wells upon their own lands, and thereby absorbed so much of the percolating water by the united effects of all the wells as would sensibly and injuriously diminish the quantity of water in the river, though no one well alone could have that effect, could an action be maintained against any one of them? and, if any, which?—for it is clear that no action could be maintained against them jointly. In the course of the argument one of your Lordships (Lord Brougham) adverted to

the French artesian well at the Abattoir de Grenelle, which was said to draw part of its supplies from a distance of forty miles under ground, but, and as far as is known, from percolating water. In the present case, the water which finds its way into the defendant's well is drained from and percolates through an extensive district, but it is impossible to say how much from any part. If the rain which has fallen may not be intercepted whilst it is merely percolating through the soil, no man could safely collect the rain-water as it fell into a pond, nor would he have a right to intercept its fall before it reached the ground by extensive roofing, from which it might be conveyed by tanks, to the sensible diminution of water which had, before the erection of such impediments, reached the ground, and flowed to the plaintiff's mill. In the present case, the defendant's well is only a quarter of a mile from the river Wandle; but the question would have been the same if the distance had been ten or twenty or more miles distant, provided the effect had been to prevent underground percolating water from finding its way to the river and increasing its quantity, to the detriment of the plaintiff's mill. Such a right as that claimed by the plaintiff is so indefinite and unlimited, that, unsupported as it is by any weight of authority, we do not think that it can be well founded, or that the present action is maintainable; and we therefore answer your Lordships' question in the negative."

We have seen, in treating of the subject of water, that all lands must receive and pass on natural flowing streams which come down from higher levels. But



where the owner of a coal-field excavated his coal, and in so doing left large hollows which filled with water, and then, when the adjoining landowner proceeded to work his coal, the subterraneous water from the hollows flowed into his workings and flooded them, it was held that he had no right of action for the damage.\*

*Defilement of Water.*—Every owner of the bank of a flowing stream has a right to the flow of the stream through his land in its natural purity. If an owner of the bank higher up throws dirt and ashes or gas refuse into it, so as to defile the water and make it unfit for use, to the damage of another proprietor who has been in the habit of using the water, an action is maintainable for the injury, unless a title to so defile the water by grant or prescription can be shown.† For there is no doubt that a right to pollute and foul a stream with all sorts of refuse may be established by proof of the continued and uninterrupted use of the stream as a drain and sewer for twenty years.

*Artificial Streams.*—It is not only necessary to consider the law relating to flowing streams and natural springs, but also that relating to *artificial* streams or watercourses. “In mining operations it is always necessary to keep the works free from water, and often to acquire a large supply of water for general purposes. In effecting these objects many natural springs and streams are often directed or accumulated into one channel, or are otherwise so diverted or disturbed as very much to affect the

\* *Smith v. Kenrick*, 7 C. B. 565.

† *Murgatroyd v. Robinson*, 26 Law Journ. Q. B. 233.

interests of adjoining landowners. The right of drawing, discharging, or otherwise conducting water from its natural bed, over the lands of others, by artificial channels, is strictly an easement, and like other easements may be acquired by express grant, or sufficient uninterrupted user."\* The leading case upon this subject is the great case of *Arkwright v. Gell* (5 M. & W. 203, and 8 Law Journal, Exch.). In that case an action was brought by the plaintiff to recover damages for the diversion of some water which had formerly been conducted to his mills at Cromford, in Derbyshire. The circumstances of the case were these. In the year 1705 certain persons extended an existing underground drain, called the Cromford Sough, for the purpose of relieving from water part of the mineral field in the wapentake of Wirksworth. The company had an agreement with the owners of the mines lying near to the sough to remunerate them by certain quantities of ore raised from the mines thus benefited. The sough discharged its waters into a stream called Bonsall Brook. Below the junction stood an ancient corn mill, which was worked by the united power of the two currents. In 1738 the owners of the sough and the composition in ore granted a lease of them for 99 years, with covenants to keep the sough in repair, &c. In 1771 the lord of the manor, being owner of the land through which the sough was made, and of a piece of land between the mouth of the sough and Bonsall Brook, leased them to Sir R. Arkwright (the father of the plaintiff), together with the water issuing from the sough.

\* Bainbridge on Mines, 106.

In 1772 he erected cotton mills on this piece of land, partly on the site of the above-mentioned ancient corn mill. This lease contained a proviso that if, by the bringing up of any other sough, or by any other unforeseen or unavoidable accident, the stream from the Cromford Sough should be taken away or lessened, the lessee should have power to take down the mills and rebuild them on another site. In 1789 the lessee purchased the absolute interest in the land demised, and in so much of that through which the sough was laid as was within the manor of Cromford. In the meantime another company of adventurers had begun to construct another mining sough, called the Meer Brook Sough, on a much lower level, in the adjoining parish of Wirksworth, for the purpose of draining a larger portion of the mineral field, under a similar licence from the same mine proprietors who used the Cromford Sough. Accordingly they so extended the Meer Brook Sough that in 1836 the Cromford Sough was drained of its waters, and the water supplying the cotton mills was diverted. All the known authorities, ancient and modern, were cited and examined, and the subject was thoroughly considered by judges distinguished for ability and learning.

The judgment of the Court of Exchequer was delivered by Mr. Baron Parke, who (*inter alia*) observed : "The stream upon which the mills were constructed was not a natural watercourse, to the advantage of which, flowing in its natural course, the possessor of the land adjoining would be entitled. This was an *artificial* watercourse, and the sole object for which

it was made was to get rid of a nuisance to the mines, and to enable the proprietors to get the ores which lay within the mineral field drained by it. The flow of water through that channel was, from the nature of the case, of a temporary character, having its continuance only whilst the convenience of the mine owners required it, and in the ordinary course it would most probably cease when the mineral ore above its level should have been exhausted. That Sir R. Arkwright contemplated the discontinuance of this watercourse there is evidence in the lease of 1771; and that such an event was not improbable appears from a clause in the Cromford Canal Act. What, then, is the species of right or interest which the proprietor of the surface where the stream issued forth, or his grantees, would have in such a watercourse at common law, and independently of the effect of user under the statute 2 & 3 Will. IV. c. lxxi.? He would only have a right to use it for any purpose to which it was applicable, so long as it continued there. A user for twenty years, or a longer time, would afford no presumption of a grant of the right to the water in perpetuity. For such a grant would be neither more nor less than an obligation on the mine owner not to work his mines by the ordinary mode of getting minerals, below the level drained by that sough, and to keep these mines flooded up to that level, in order to make the flow of water constant, for the benefit of those who had used it for some profitable purpose. How can it be supposed that the mine owners could have meant to burden themselves with such a servitude so destructive to their interests? and what is there to

raise an inference of such an intention? Several instances were put, in the course of the argument, of cases analogous to the present, in which it could not be contended for a moment that any right was acquired. A steam-engine is used by the owner of a mine to drain it, and the water pumped up flows in a channel to the estate of the adjoining landowner, and is there used for agricultural purposes for twenty years. Is it possible, from the fact of such user, to presume a grant from the owner of the steam-engine of the right to the water in perpetuity, so as to burden himself and the assigns of his mine with the obligation to keep a steam-engine for ever, for the benefit of the landowner? Or if the water from the spout of the eaves of a row of houses was to flow into a yard and be there used for twenty years by its occupiers for domestic purposes, could it be successfully contended that the owners of the houses had contracted an obligation not to alter their construction so as to impair the flow of water? Clearly not. In all, the nature of the case distinctly shows that no right is acquired as *against the owner of the property* from which the course of water takes its origin; though as between the *first and any subsequent appropriator* of the watercourse itself such a right may be acquired. So in this case Sir R. Arkwright, by the grant from the owner of the surface, acquired a right to use the stream *as against him*; and if there had been no such grant, he would by twenty years' user have acquired the like right as against such owner. But the user, even for a much longer period, whilst the flow of water was going on for the convenience of the mines,

would afford no presumption of a grant at common law *as against the owner of the mines.*

“It remains to be considered whether the statute 2 & 3 Will. IV. c. lxxi. gives to the plaintiff and those who claim under him any such right. We are clearly of opinion that it does not. The whole purview of the Act shows that it applies only to such rights as would before the Act have been acquired by the presumption of a grant from long user. The Act requires enjoyment for different periods ‘without interruption,’ and therefore necessarily imports such a user as might be interrupted by some one capable of resisting the claim; and it also requires it to be ‘of right.’ But the use of the water in this case could not be the subject of an action at the suit of the proprietors of the mineral field lying below the level of the Cromford Sough, and was incapable of interruption by them at any time during the whole period by any reasonable mode, and as against them it was not ‘of right;’ they had no interest to prevent it, and until it became necessary to drain the lower part of the field, indeed at all times, it was wholly immaterial to them what became of the water, so long as their mines were freed from it.

“We therefore think that the plaintiffs never acquired any right to have the stream of water continued in its former channel, either by the presumption of a grant or by the recent statute, as against the owners of the lower level of the mineral field, or the defendants, acting by their authority; and therefore our judgment must be for the defendants.”

In a recent case the law was again stated as follows.

The right to a stream flowing in a natural channel through a man's land, and the right to water flowing to it through an artificial watercourse constructed on his neighbour's land, *do not* rest on the same principles. In the former, each riparian owner in succession is *primâ facie* entitled to the free flow of the water in its natural channel, and to its reasonable enjoyment as it passes through his land. But in the second case, any right to the flow of the water artificially guided must rest on some grant or arrangement, proved or presumed, from or with the owners of the land from which the water is artificially brought, or on some other special legal origin. (See *Rameghur Pershael v. Koonj Behari*, L. R. 4, App. Cases.)

It has also recently been decided that if an artificial stream has been used and enjoyed in such a manner and for such a time as would give adverse rights in the case of natural streams, the same may be acquired in the artificial stream. (*Suteliffe v. Booth*, 32 Law Journal, Q. B. 136.)

## CHAPTER VIII.

### PARTNERSHIP IN COLLIERIES.

It would carry this treatise beyond its intended limits to go fully into the law of partnership. But as it is designed to be a help to private individuals concerned in collieries, it may be useful to insert a sketch of the legal rules and doctrines which govern the relation of partners.

Lord Justice Lindley, in his treatise on the Law of Partnership, and Sir George Jessel, the late Master of the Rolls, have both declined to give a definition of a partnership; we shall therefore not attempt to do so.

In *Pooley v. Driver*, 5 Ch. Div., the Master of the Rolls in his judgment, after referring at page 471 to the fifteen definitions of partnership by different learned lawyers, given in Lindley "On Partnership," says: "I think no two of them exactly agree, but there is considerable agreement amongst them, and I suppose any one reading the fifteen may get a general notion of what partnership means. *Whatever may amount to a partnership is a subject which has been settled by decision according to English law*, and the incidents of the partnership simply follow from the establishment



of the fact of partnership. The definition given in the Code of New York is, 'Partnership is the association of two or more persons for the purpose of carrying on business together and dividing the profits between them.' I say as a general rule that simple definition appears so far as it goes to be an accurate definition." Further on in the judgment he observes that the business referred to in the definition must be taken to be an *honest* calling. From the portion we have italicised it will be seen that, though there is great difficulty in framing a perfect definition of a partnership, there is no such difficulty in applying the principles of decided cases to determine whether, in any given set of circumstances, a partnership has or has not been created.

Whether an agreement amounts to a partnership or not depends on the real meaning of the parties to it, as expressed in the agreement itself. Where the parties have agreed to share profits *and* loss a partnership certainly is created. Where the agreement is to share profits, nothing being said about losses, the law is thus stated by the Master of the Rolls in the judgment above referred to: "I think it may be taken as established by the authorities that, in the absence of something in the contract to show a contrary intention, the right to share profits as profits constitutes according to English law a partnership."

Where there is an agreement to share the profits of a business a partnership may be created thereby, even though there be an express stipulation against community of loss.

A partnership is not the result of an agreement to

share gross returns, nor of an agreement which is not concluded. As between themselves persons can only become partners by agreement, express or implied ; but a person not really a partner may become liable as such to third persons, by holding himself out as a partner, that is, by representing or allowing himself to be represented as a partner, or acting in such a way as to lead others to believe he is a partner. If in this way he induces others to make contracts with or give credit to the firm, he will be responsible as if he were really a partner. But express notice that he has no interest in the firm will relieve him.

It was formerly held that if a person shared in the profits of a business, that fact would make him a partner for all purposes whatever. But the doctrine was modified by the case of *Cox v. Hickman* (8 House of Lords' cases), and was followed by the statute 28 & 29 Vict. c. lxxxvi., which enacts several limitations in the responsibility of parties deriving payments from partnership funds. Thus mere loans to a trader at a rate of interest varying with the profits, provided there be a signed contract in writing ; or the remuneration of an agent or servant by a share in the profits ; or the receipt by a widow or child of a deceased partner of an annuity out of the profits, shall not render them *ipso facto* responsible as partners.

The contract of partnership is commonly reduced into writing, but does not necessarily require any particular formality. It may even be constituted without any written agreement, unless it is to commence at some distant date more than a year from the time of the agreement.

*Powers of each Partner.*—Every partner is considered as the general agent for the firm, in the transaction of the business in the ordinary way.

Generally, one partner has an implied authority to bind the firm by contracts relating to the partnership, and he can do this by mere verbal or written agreements, or by negotiable securities, such as bills of exchange, or promissory notes. One partner may pledge the credit of the firm to any amount. It is a general rule that each partner is the accredited agent of the rest, whether they be active, nominal, or dormant partners, and has authority as such to bind them in the manner stated above to any person dealing *bonâ fide*. Although it may have been agreed among themselves that he shall have no such authority, yet they will be bound, unless the party dealing with him has notice of the arrangement. But one partner has no power to bind his co-partner by *deed*, unless he has express authority by deed for that purpose. It seems, however, that a release by deed by one of several partners to a debtor of the firm will bind the firm; but if such a release be fraudulent, it will be set aside by a Court of Equity.

It must be observed that in order to bind the firm, a contract entered into by one partner must be respecting the partnership business.

On the other hand, when the transaction appears to have nothing to do with the partnership, the firm will not be bound except in special circumstances.

“It has,” said Lord Chief Justice Abbot, “undoubtedly been held that in a matter wholly unconnected with the partnership, one partner cannot bind

the other ; but the true construction of the rule is this, that the act and assurance of one partner, made with reference to business transacted by the firm, will bind all the partners."

*Good Faith required.*—In the conduct of partners to each other the most scrupulous fidelity must be observed. One is not allowed to treat privately and behind the backs of his co-partners for any advantage to himself at the expense of the rest ; as, for instance, for a lease of the premises where the joint business is carried on. If he does so obtain a lease in his own name, it is a trust for the partnership. In short, the most scrupulous good faith is required by Courts of Equity, which will even declare a partnership dissolved in case of any flagrant breach of fidelity.

When articles of partnership are drawn up they must, of course, be acted upon as far as they will go.

If a firm obtain the benefit of a contract made with one of its members it is generally bound by the contract. But that inference may be rebutted by evidence that he contracted, and that the other party knew the fact, in his own name and in his own behalf.

*Negligence.*—An ordinary partnership is answerable in damages for the negligence of any of its partners or servants in the business of the partnership. But, as a rule, a partnership will not be answerable for a wilful wrong done by one of the partners.

In *Bury v. Allen* (1 Coll. 604), the Court thus stated the law as to losses occasioned by the negligence of a partner : " Suppose the case of an act of fraud, or culpable negligence, or wilful default by a partner during the partnership, to the damage of its property

or interests in breach of his duty to the partnership, whether at law compellable or not compellable, he is certainly in Equity compellable to compensate or indemnify the partnership in this respect."

*Disputes between Partners.*—When the partnership articles contain express provisions applicable to a dispute, it must be settled according to such provisions. Where they do not, and the matter is incidental to the legitimate business of the partnership, regard must be had to the state of things actually existing. If the partners are equally divided, the existing state of things cannot be altered. If, however, they are unequally divided, the minority must give way to the majority. But, nevertheless, the minority must first be consulted.

If, however, the dispute relates to matters with which it was never intended, when the partnership was formed, that it should concern itself, the majority cannot overrule the minority.

Every member of an ordinary partnership is liable to the last farthing for the debts and engagements of the firm. But it is competent for any one dealing with a firm to contract to look only to the partnership funds for payment.

*Commencement of Liability.*—When no time is specified for the commencement of the partnership, the liabilities of the firm will commence from the date of the deed, and the responsibility of each for the engagements of the others will begin from the commencement of the partnership however formed. An in-coming partner is not liable for the debts contracted before he joined the firm. But he should be careful how he pays

any part of the old debts, or interest on them, or he may render himself liable.

*Notice of Retirement.*—On the retirement of an ostensible partner, notice of his retirement must be given, or he will be liable to the creditors of the continuing firm for subsequent contracts made by them. Such notices are usually published in the *Gazette*; but they will not bind creditors who have dealt with the firm, to whom *express* notice should be given. To those who have not so dealt, notice in the *Gazette* will be sufficient.

Third persons have a claim on a dormant partner (that is, one who has an interest in the profits of the concern, but whose name does not appear), for contracts entered into by the firm while he was a member. But if a dormant partner retires from the firm, notice of the fact need not be given by him to creditors to protect himself from subsequent engagements, for when he ceases in fact to be a partner, his future responsibility ceases also.

*Negotiable Instruments.*—As a rule the partners of an ordinary trading firm can bind the firm by drawing, accepting, or indorsing bills of exchange, &c., but it has been held that a mining partnership is an exception to the rule. This view, however, was based on the supposition that mining firms do not require to deal with such paper; and this supposition must be generally erroneous.

*Dissolution of Partnership.*—A partnership may be dissolved by the termination of the period to which it was limited; by mutual agreement; or by a decree of the Chancery Division of the High Court.

A dissolution does not discharge any of the partners from liabilities previously incurred, but notice of it closes the power of each to bind the rest. The retirement of a partner has the same effect. After the dissolution, or the retirement of a partner, and notification of the fact, no member of the firm as it was previously constituted is, by virtue of his connection, liable for goods supplied to his partners subsequent to such notification. The death of a partner operates as a dissolution of the firm as between *all* its members unless there is an agreement to the contrary, nor can the executors become partners, or interfere, in the absence of an agreement to that effect. The surviving members have no right to take the share of a deceased partner at a valuation unless it was so agreed, and the executors ought not to leave the testator's assets in the trade in which at his death he was engaged.

*Mines.*—As to mines, a partnership for working a mine is considered by the Courts to be on a footing with any other trading partnership.

*Bankruptcy.*—If a firm become bankrupt, as such, the general consequences of that event fall under the law of bankruptcy. On the bankruptcy of a single member of a firm the whole firm is dissolved ordinarily, “but it seems that this doctrine is not applicable to mining partnerships.” The Bankruptcy Act, 1883, contains several sections dealing with the bankruptcies of firms and individual members thereof.

Sect. 59 deals with joint and separate dividends.

Sect. 110 provides that “Any creditor whose debt is sufficient to entitle him to present a bankruptcy petition against all the partners of a firm, may present

a petition against any one or more partners of the firm without including the others." By sect. 112 the property of partners is to be vested in the same trustee.

Sect. 113 provides that "Where a member of a partnership is adjudged bankrupt, the Court may authorise the trustee to commence and prosecute any action in the names of the trustee and of the bankrupt's partner, *and any release by such partner of the debt or demand to which the action relates shall be void*; but notice of the application for authority to commence the action shall be given to him, and he may show cause against it, and on his application the Court may, if it think fit, direct that he shall receive his proper share of the proceeds of the action, and if he does not claim any benefit therefrom he shall be indemnified against costs in respect thereof as the Court directs."

Sect. 115 provides that partners may take proceedings or be proceeded against under the Act in the name of the firm, and sect. 123 that a "receiving order shall not be made against any corporation, or against any partnership or company registered under the Companies Act, 1862."

*Joint Stock Companies.*—A brief notice of the organisation required by the recent Acts of Parliament seems all that need be inserted in this treatise. By sect. 6 of the Companies Act, 1862, any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this Act in respect of registration, form an incorporated company with or without limited liability.



By the 4th sect. of the same Act no company, association, or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on business that has for its object the acquisition of gain, unless it is registered as a company under the Act, or is formed in pursuance of some other Act of Parliament, or of letters patent, or is a company engaged in working mines within and subject to the jurisdiction of the Stannaries.

## CHAPTER IX.

### ON THE CONTRACT BETWEEN MASTERS AND COLLIERIES.

It is very important to the employer of labour, and also to the labourer himself, that they should have a clear comprehension of their mutual rights and duties. To this end it will be useful to state in the outset that a contract or agreement is where a promise is made on one side, and assented to on the other, or where two or more persons enter into an engagement with each other by a promise on either side. This contract, when not made by deed, is not binding in law, unless it is founded upon a *consideration*, by which is meant some compensation or return to be reciprocally given by the person to whom the promise is made. But any kind of reciprocity, whether benefit bestowed or disadvantage sustained by the person to whom the promise is made, will prevent the contract from being invalid.

The consideration need not be such as in fairness would be adequate ; that is a matter for the partner to the agreement. The Courts will not inquire, for example, whether a workman's wages are too low, or

whether the agreement is too much in favour of one of the parties. In many contracts of service the consideration is not expressed. The parties have in their minds certain usages or customs. They do not state them, but assume and take them for granted as well-understood elements in the contract.

In general a simple contract—that is, one that is not set forth in a deed—may be either written or verbal. But the Statute of Frauds (29 Car. II. c. iii. s. 4) enacts that in some cases a note or memorandum of the agreement shall be made in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorised; as to where there is any agreement that is not to be performed within a year from the making thereof. There are other contracts comprised in the same section, but as they hardly have any relation to collieries they are not referred to now.

It is important to notice the distinction between express and implied contracts. Express contracts are those which are openly uttered or written at the time of the making of them. But there is a large class of contracts which are implied, that is, depend for their terms and their force upon a mere construction of law. The general rule is, that the law will imply that a man actually promises to fulfil that which he ought to fulfil. For example, if A. employs a person to do any work for him, but nothing is said about payment, the law steps in and supplies the want of an express promise by implying that A. will pay the workman so much as his labour deserved. So any person who undertakes to execute any special work, impliedly

undertakes to do it in a workmanlike manner ; and he who takes upon himself any office, employment, or duty, is supposed by the law to undertake that he will perform it with integrity. On the other hand, if a person is employed to perform any work which it is not his ordinary and usual business or art to do, the law implies no such general undertaking, and leaves it to be made the subject of a special arrangement between the parties.

Another rule relates to the competency of persons to bind themselves by contracts. "Infants," that is, persons under twenty-one years of age, are allowed by law to make binding contracts which are for their benefit and advantage. Contracts of hiring and service are, *primâ facie*, of this kind. But if the contract is unfair and prejudicial the infant is not bound. Parliament has of late years interposed with reference to the hiring and service of women and boys in collieries. The statute 35 & 36 Vict. c. lxxvi. enacts various limitations, which will be found in the Act annexed to this edition.

#### CONTRACTS BY AGENTS.

In speaking of contracts it has been hitherto assumed that they are made between the principal parties themselves ; but a contract of any kind may be entered into either by the parties in person, or by their agents lawfully authorised. An agent is a person authorised by another to do acts or make engagements for him in his name. The person who

so authorises him is called the principal. Generally, no particular form is necessary for the appointment of an agent. A mere verbal appointment is sufficient ; and even the fact of one person being employed to do any business whatever for another will create between them the relation of principal and agent. But there are some few acts in reference to the granting of leases and the creation of any uncertain interest in land, for which the authority of the agent must be in writing, or by deed.

The authority of an agent may in general be revoked by the principal at any time. It also ceases upon his death or bankruptcy. In mercantile transactions it is a universal rule that, in the absence of other instructions, the principal must be supposed to intend that his agent should follow the common usage of the business in which he is employed. This therefore is the course which it is the agent's duty to pursue. An agent may be either a *general* or a *special* agent. If he is empowered to act generally in the affairs of another, or to act generally in some particular capacity (as, for example, to act generally in the management of a particular colliery), he is a general agent. Such a person will be presumed by the law in favour of the rights of strangers who deal with him, to have authority for what he does, provided it falls within the usual limits of the business he has to perform, even though he may be transgressing some private direction of his employer.

The contract of an agent is the contract of the principal, if it is properly entered into by him by

virtue of his commission. The act of the agent gives the principal the same rights and imposes on him the same obligations as if he had done it himself. In the course of business at collieries, it rarely happens that colliers are personally engaged by the proprietor ; but a contract entered into by an agent, who is commissioned to act generally in the colliery, or has a special authority to engage workmen, is binding on the proprietor. It must be borne in mind, however, that such contract must always be within what may be called the *apparent* authority of the agent ; that is, such as the workman who makes the engagement with the agent might, under the circumstances, reasonably suppose to be within the scope of his commission. Thus if a strange collier, seeking employment in a colliery, is referred to a person who affects to act in such business, and is apparently clothed with authority in the colliery, the engagement made with him will bind the principal. But it is otherwise if the collier accepts an engagement from a mere workman, or labourer, who has no apparent authority to make contracts, or is not specially empowered to do so. But if any act or engagement is done or made by an agent of any kind without sufficient authority, it may always be made good by the subsequent assent of the principal ; and then the effect is exactly the same as if full power had been given in the first instance. The rule of law is that every such ratification has a retrospective effect. Thus if a collier is improperly engaged by a person not fully authorised to do so, and afterwards receives wages at the office, that would in general be

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such a recognition of his engagement as would make it binding upon the principal.

#### ON THE CONTRACT OF HIRING.

A collier is a person who agrees to become the servant of another for the purpose of cutting coal or performing some similar service, in consideration of wages. A contract of hiring and service need not be in writing, unless it be for a period longer than a year, or for a year to commence at some future time. If it is reduced to writing it is not liable to any stamp duty, unless it relate to the superior class of clerks, &c., employed in a colliery.

*General Hiring.*—If nothing is said as to the duration of the engagement and no custom exists relating to this point, the hiring is considered as a general hiring, and in point of law a hiring for a year.\* But this rule does not apply where the contract contains conditions or stipulations inconsistent with the notion of hiring for a year, or where (as is generally the case in coal districts), from some general and well-known custom, the parties may be supposed to have made their engagement with mutual reference to such custom.

*Contract Book.*—To prevent misunderstandings and disputes, it is very expedient that in the office of a colliery a contract-book should be kept, and the terms of it read over to every collier who accepts employment there. He should further be required to

\* *Fawcett v. Cash*, 5 B. & Ad. 904.

sign his name in the book, or affix his mark, if he is satisfied with the conditions proposed. Such a book has come into use since the passing of the Employers' Liability Act, 1880. (See chap. xvi.)

*Form of Contract.*—For the convenience of proprietors a form of such a contract is here suggested, which the author conceives will meet the difficulties which magistrates have often felt in dealing with contracts of this nature.

“In consideration that Mr. A. B. will employ me as a collier, &c., from the 1st of                      , 18    , as regularly as the state of the trade, works, and machinery will permit, and pay me wages at                      per ton of hand-picked coal by                      payments, I agree to serve the said Mr. A. B. from the                      day of                      , 18    , and to obey all lawful orders of my said master and his agents, and overmen duly authorised, and to obey and keep all the rules duly established by law for the regulation of this colliery, subject always to a notice of                      weeks to be given on either side before leaving or being discharged from this colliery, except for lawful cause.”

There is good reason to believe that such a consideration as that expressed above would uphold the contract to serve; for the judgment of Lord Campbell in the case of *Ex parte Baily* (which will presently be referred to more particularly), appears to go to this extent.

*Unwritten and implied Contracts.*—The importance of having a written contract is great, though it is not now a necessary condition of proceeding against a



collier under the Master and Servants Act, for not entering upon the service for which he has contracted. It also puts an end to all uncertainty as to the terms and conditions on either side. But as, unfortunately, this practice is not generally adopted, it is proper to state that if a collier of the district asks for employment at the office, and is simply told that he may go to work in some specified part of the workings, and he goes without further question, it will be considered that he accepts that employment *on the basis of the customs and usages of that district and colliery* as to pay, hours, notice, &c., provided he continues to work and receive pay for such a period as to raise the presumption that he must have acquainted himself with the customs there prevalent, and with the course of business in the particular pit.

There are many cases in which usage is allowed to be engrafted on the contract in addition to the express terms. The usage can be excluded by stipulations, but when that is not done, it is fair to infer that the parties contracted with reference to it. The notoriety of a custom makes it part of the contract. The parties are justly supposed to include in their agreement all the conditions which established custom has annexed to contracts of the same kind. But the Courts never admit evidence of usage which is incompatible with the written contract. When a stipulation is inconsistent with the custom of the country or well-known usage in the trade of a district, the contract must prevail, and the customs give way.

In the case of a new collier, recently brought into the work, to whom no pains have been taken to state

the terms of the contract of service, it is not reasonable that such a person should be held liable to all the penal consequences of a breach of an implied contract as the other older colliers would be. It would rather seem that when a new collier goes to work without any express agreement, he is at first only bound by the general customs which prevail in all the collieries of that country; and that as to wages, he can only enforce his claim to whatever sum he can prove his work to be worth. After a pay-day has passed over, and he has received wages at a certain rate, and has had a reasonable time to acquaint himself with the course of employment and wages in the colliery, it may fairly be assumed that he has tacitly assented to all the conditions under which the other colliers labour, and has contracted to serve upon those terms. It need hardly be added, that every collier is bound by the special rules as certified by the Inspector, provided they are duly published according to sect. 15 of the Act of Parliament.

It must be observed, however, that the writer has no express authority for these propositions. They are submitted by him as his own opinion of transactions of this nature. It must be admitted that it is highly inexpedient that contracts of hiring should be left to be elicited in this uncertain fashion. In all those points on which it is intended to insist, the collier should be expressly told what he is to do and what he is not to do, and it is hoped that the plan of a contract-book, above alluded to, will be generally adopted.

*General and Special Rules.*—The general and special

rules of the colliery certified by the Inspector of Mines should also be kept in large print, and be stuck up in the places required by the Act of Parliament, which will be found in another part of this work.

*How the Contract may be terminated.*—The contract of service may be put an end to on either side by giving the notice stipulated for, or (in the absence of a stipulation) fixed by the custom of the district. This period generally tallies with the length of the time between the pay-days. In South Wales a month's notice is usually required, and the payment of wages is monthly. The Editors are informed by an eminent mining engineer in the North that, "It is universally the custom in the counties of Durham and Northumberland to pay men fortnightly, and this notice is required on either side to terminate a contract." The consideration of the rescinding of contracts by colliers, and the discharge of colliers from their service, for various causes, will be reserved until the statutes respecting master and servant are treated of at the end of this chapter.

The period of notice does not necessarily depend upon the length of time between the pay-days. It is now generally the custom in South Wales to give a month's notice, whether the wages are paid fortnightly or monthly. In case of the anticipated stoppage of a colliery, it is a common practice, after the month's notice has expired, to issue a fresh notice, setting forth that all future contracts would be as from day to day. This latter notice is continued each month so long as a stoppage is anticipated. In case the stoppage does not take place and the colliery is likely to be kept going

indefinitely, the latter notice is discontinued and the customary notice is understood to be again introduced.

*Stoppage of Work.*—Questions sometimes arise as to the liability of masters for the wages of colliers during a period when they cannot work, or, as the term is, when the pit is “laid off work.” This will depend entirely upon the special terms of the contract of hiring. If the contract contains merely an undertaking on the part of the master to pay certain stipulated wages in proportion to the work done, and nothing is expressed as to wages to be paid when the work cannot go on, there is no *implied* obligation on the part of the master to find work. Thus where the defendant, the owner of a colliery, agreed with the plaintiff, a collier, “to hew coals, and do such other work as might be necessary for carrying on the colliery as he should be required to do, at the prices following: First, the owners agree to pay the plaintiff once a fortnight upon the usual day, the wages by them to be earned at the following rates (specifying the rates and manner of working). Fifth, the said parties hereby hired shall during all the times the pit shall be laid off work continue the servants of the said owners, subject to their orders, and liable to be employed by them at such work as they shall see fit. Sixth, the said hewers shall, when required, except when prevented by sickness, or other unavoidable cause, do a full day’s work on every working day, and shall not leave their work until such day’s work is performed; and in default thereof each of the said parties shall forfeit 2s. 6d. The pit to commence coal work at such times in the morning as shall be required

to suit the trade," &c. It was held by the Court of Queen's Bench that the agreement contained no promise on the part of the defendant to employ the collier at reasonable times for a reasonable number of working days during the term of his hiring, and that no action would lie against the defendant for not doing so, although the plaintiff was thereby unable to earn wages. It was quite optional with him to set the labourers to work.\*

But the case is different where a master by the contract of hiring undertakes for the payment of wages, not in proportion to the work done. It may be optional with him to find work, and he may, if he pleases, discontinue his business. But having promised to pay wages without reference to their being in proportion to work done, he must pay them whether he find work or not. If he does not do so, he will be liable to an action for damages for breach of contract.†

It is obvious that the working of collieries cannot be carried on without occasional interruptions. Accidents of an unavoidable nature, and checks in trade arising from want of shipping, adverse winds, the freezing of canals, and other such circumstances, must sometimes stop the collier's work. Has he any claim upon the proprietor of the colliery during such periods of idleness? The Editors think not. The contract is entered into on both sides with a perfect knowledge of this liability to stoppages, and it would probably be considered by Courts of Law that the

\* *Williamson v. Taylor*, 5 Q. B. 175.

† *Aspdin v. Austin*, 5 Q. B. 671.

engagement was based upon this knowledge and understanding. It would, however, tend to prevent disputes, if this point were always clearly expressed in a contract book, to be signed by the colliers before entering upon their work. The form on page 142 provides against contingencies of this kind, and binds the collier to take his chance of temporary stoppages, subject to his right to give notice of his intention to leave. But even when the contract is not expressed, either verbally or in writing, and is only inferred from usage (as is unfortunately but too often the case), these contingencies must be assumed to have been in the contemplation of the parties to it. Any collier who has once been stopped working from any such cause, and has resumed work without complaint, must, of course, be considered to have waived any right to complain, if he had any such. A new collier hired upon an implied contract, and ignorant of local circumstances, might, doubtless, raise the question by suing for damages for loss of time and wages, if he had not compromised his chance of success by a waiver. It might be contended that the contract was bad for want of mutuality.

*Mutuality.*—Stoppages of this kind do frequently occur in those collieries dependent upon water-carriage, which is liable to be checked by adverse winds, want of vessels, cessation of demand, and frost. The case of colliers thus employed is different from that of those whose labour supplies iron-works, or any other regular home demand. The risk in the former work is accompanied by a higher rate of wages, and the certainty in the latter by a lower rate. It has

been contended that the contract of the first-mentioned, or sea-coal colliers, is void for want of mutuality, on the ground that it falls under the rule laid down in the case of *Williamson v. Taylor*, quoted above. In that case Lord Denman said, "I do not find anything in the terms of the agreement to make it imperative on the master to keep the pit at work at any given time, or to find employment all the year round."

Undoubtedly, if the collier cannot show a contract which entitled him to have full employment whenever it was to be had, but is to be left at the caprice and mercy of his master, there will be no binding agreement, for there would be no mutuality. Thus in the case of *R. v. Lord* (17 Law Journ. M. C. 131), there had been a conviction of a servant for unlawfully absenting himself from his master's employment. The contract was to serve for twelve months at certain weekly wages, and to serve the said master at all times, and to work fifty-eight hours per week, with a proviso that in case the steam-engine should be stopped, from accident or other cause, then the master might *retain* all the wages of the servant during that time. Lord Denman said, "Among many objections, one appears to be fatal. The servant was an infant at the time of entering into the agreement, which authorises the master to stop his wages when the engine is stopped from working from any cause. An agreement to serve for wages may be for the benefit of the infant, but an agreement which compels him to serve at all times during the term, but leaves the master free to stop his work and wages whenever he chooses,

cannot be considered beneficial to the servant. It is inequitable and wholly void." But this case was that of an infant, and it does not clearly appear how far the Court decided on the special ground of the infancy. At any rate this case differs from the ordinary contract of the sea-coal collier. There is indeed an element of uncertainty in the latter, but that does not arise from the master's caprice, but from circumstances over which he has no control. The contract may be merely an implied one, no written or verbal agreement having been made, but it certainly gives to the collier a claim to employment when employment is to be had. He knows well that this uncertainty exists, and he contracts with reference to it. Casual but highly-paid work suits some men better than certain employment at a lower rate. It is perhaps best to avoid all difficulty by undertaking to give some small remuneration, as a retaining fee, to the collier for each day he is involuntarily without work. At all events it is expedient to adopt a written contract containing a clause like that in the form above given, in which this uncertain quality of employment shall be stated. But in the absence of such remuneration and written contract it is believed that the implied contract would be upheld by the Courts of Law, as being founded upon a sufficient consideration to make them legal and effectual.

The recent case of *Ex parte Bailly* (23 Law Journ. M. C. 161) confirms this opinion. In that case Bailly had been committed to prison for misconduct as a servant. It appeared that he contracted to serve Messrs. Marshall as a collier for one month, and so on from



month to month, determinable on a month's notice, and for the wages of 1s. 10d. per ton for cutting coal, that he entered into the service, and afterwards unlawfully absented himself, without lawful excuse. A writ of Habeas Corpus had been issued to bring the prisoner before the Court of Queen's Bench, and affidavits were held to be admissible to show that the justices had no evidence before them from which they could legally infer a contract creating the relation of master and servant, thus negating jurisdiction. The affidavits were defective, but it was assumed for the purposes of the decision that Baily was employed under a contract to serve until a month's notice should be given by either party; that the price should be 1s. 10d. per ton of coal cut, and should rise and fall with the price in other collieries in the district, but that the price was not to affect the month's notice; that he should serve the employer exclusively and not work for any other person during the said service; that if trade was slack, or the works stopped by accident, the employer was to provide him with work, or pay him reasonable wages; and it was assumed that the evidence on the part of Baily was that he was not bound to any hours of working, nor to cut any quantity of coal; that the employment in the colliery depended on the demand for coal, and that there was not always full employment, and that no allowance was made for loss of time when trade was slack, or the works stopped by accident.

It was contended that there was no obligation on the part of this collier to serve personally, and that he was at liberty to do as much or little work as he

pleased ; and that the employers were not bound to find work for the colliers, and that consequently there was no valid consideration for the contract to serve. But Lord Campbell remarked upon this, "It may be that the employers were not bound to keep open their colliery, but *could they have excluded their men*, and taken in others to work while their colliery was open ? If not, then there is ample consideration for a contract by the prisoner, which he broke by striking for wages." And again, "I think there is sufficient evidence of a contract to serve for a month. It is said there is no consideration. But there was an obligation on the masters to employ and to pay the men, not, indeed, day by day, but *an obligation to continue the relation of master and servant*, until the contract was determined in the manner prescribed, and *that is a sufficient consideration for the contract to serve on the part of the men*. Then it is said there was no engagement to serve personally ; but I think the justices might reasonably infer that there was to be a personal service, and if so, by refusing to work they broke their contract. Therefore I think there was evidence upon which they might have arrived at the conclusion stated in the warrant, and that being so, we cannot review their decision." The fact is that, as to the legal obligation on the employer to find work for the employed continuously, no general definite rule can be laid down. Each case must be decided on its own merits and circumstances. It must be the business of the Court, in the event of dispute, to decide upon the facts and surrounding circumstances, whether it was intended that such work should be found. It should always be an element in

disputes of this kind, that the activity of collieries is liable to various disturbing circumstances and unavoidable interruptions which the experience of colliers makes them well acquainted with. It is desirable, therefore, that all parties should so contract as to anticipate disputes, instead of risking the anxiety and expense of litigation.

## CHAPTER X.

### DISPUTES BETWEEN MASTERS AND COLLIERS.

SINCE the issue of the last edition, the law relating to disputes of this nature has been materially altered by two statutes. In the year 1875, the Act called "The Employers and Workmen Act" was passed (38 & 39 Vict. c. xc.), by virtue of which a dispute between employers and workmen, including miners, may be heard and decided by a Court of Summary Jurisdiction. This Court is constituted either by a Stipendiary Magistrate in any district in which such a magistrate is appointed, sitting at a Police Court or other appointed place, and elsewhere by two Justices of the Peace sitting at some place appointed for holding Petty Sessions. The word dispute is a general word, and seems to include every pecuniary claim connected with the contract. But the Court is not to exercise any jurisdiction where the amount claimed exceeds *ten pounds*. Subject to this limitation, the Court may determine the dispute in various ways. It may simply order payment of any sum it may find to be due as wages or damages; or (2) it may adjust and set off the one against the other, all

such claims on the part of either employer or workman arising out of the relation between them, as the Court may find to be subsisting; or (3) it may rescind any contract between them on such terms as it thinks just; or (4) in cases where the Court might otherwise award damages for breach of contract, it may, if the defendant is willing to give security to the satisfaction of the Court for the *performance* of so much of his contract as remains unperformed, with the consent of the plaintiff, accept such security and order such performance in lieu of giving damages.

Thus it appears that the recent Employers and Workmen Act, 1875, creates a civil jurisdiction, and virtually constitutes a stipendiary magistrate, or (if there be none) two justices in Petty Sessions, a Court of Law and Equity to determine their disputes within the limit above mentioned. It should be observed that to give the magistrates jurisdiction, the workman must have engaged to give his *personal* labour. If he contracts to do work by other men working under him, he does not come within the provisions of this statute. Such a party is a contractor or agent and not simply a workman.

With respect to the mode of procedure, the alterations of the law are considerable. A person who is desirous of entering an action in a Court of Summary Jurisdiction, must go to the clerk of the Court and deliver to him the particulars in writing of his complaint or "cause of action." The clerk will assist him in making his written statement in regular form, and enter in a book certain particulars of the intended action. Then a summons to appear to the plaint will be issued, and a

copy of it must be served upon the defendant personally or by leaving it with some person apparently sixteen years of age, at the house or place of dwelling, or place of business, or of employment of the defendant, or one of them, or at the office of the employer. It is important to note that there must be four *clear intervening* days between the day on which the summons is served and the day on which the hearing takes place. It is also important to know that summonses of this class may be signed by the clerk of the Court, when he has received a general authority to do so. For the convenience of suitors, too, it is enacted that the summons may be issued in any district in which the defendant or one of the defendants dwelt or carried on his business, or was employed at the time the cause of action arose, or in which he or one of them happens to be at the time the plaint is entered. But no order of commitment is to be made by the Court unless a second summons called a "judgment-summons" shall have been personally served upon the debtor. The object of this enactment is to enable the Court to ascertain whether the debtor is able or unable to pay the amount ordered to be paid, and to prevent the imprisonment of those who are found to be *bonâ fide* unable to find the money.

Thus every facility is afforded to the working collier on one hand, to recover wages earned or compensation for wrongful treatment under the contract, and to the employer, on the other hand, to obtain from his workman the actual performance of his contract, or compensation for the breach of it. The new law is conceived and framed in a spirit of equal justice to

all parties to contracts which fall under its provisions, and it appears to work to the satisfaction of all who are interested in it.

Concurrently with the Act above quoted, another Act was passed in 1875, entitled, "An Act for Amending the Laws relating to Conspiracy and to the Protection of Property, and for other purposes" (38 & 39 Vict. c. lxxxvi.). This important Act repeals many previous statutes, and practically and substantially constitutes, with the Employers and Workmen Act, the code by which the relations and disputes of the managers of collieries and colliers, firemen, hauliers, banksmen, enginemen, &c., are now regulated. Some of the provisions of this statute must be briefly noticed, as they may, under exceptional circumstances, be applicable to colliers and collieries, &c. By this Act various older laws, making breaches of contract criminal, were repealed. In lieu of those enactments it has been seen that a civil jurisdiction has been substituted by the sister statute for the determination of the ordinary disputes between employers and employed.

But in the Act now referred to (38 & 39 Vict. c. lxxxvi.), it is provided that "when any person wilfully and maliciously breaks a contract of service or of hiring, knowing or having reasonable cause to believe that the probable consequences of his doing so, either alone, or in combination with others, *will be to endanger human life, or cause serious bodily injury, or to expose valuable property to destruction or serious injury*, he shall, on conviction, be liable to a penalty not exceeding £20, or to be imprisoned for a term not exceeding three months, with or without hard labour."

This enactment would probably be deemed applicable to the case of workmen under contract to attend to ventilation, and refusing without lawful excuse to perform their duty, thereby endangering the safety of other workmen or of the workings.

There is another enactment in this statute which is more frequently acted upon than the last-mentioned clause. By sect. 7 it is enacted that every person who, with a view to compel any other person to abstain from doing, wrongfully and without legal authority (1) uses violence to or intimidates such other person or his wife or children, or injures his property; or (2) persistently follows such other person about from place to place; or (3) hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or (4) watches or besets the house or other place where such other person resides or works, or carries on business, or happens to be, or the approach to such house, &c.; or (5) follows such other person with two or more others in a disorderly manner in or through any street or road, shall on conviction be liable to the same fine or imprisonment as in the previous case. But attending at or near the house, &c., or the approach to it, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section.

The person accused may be tried by a Court of Summary Jurisdiction, with an appeal from that Court to the Court of Quarter Sessions, but he may also object to be so tried, and may be committed for trial by a jury, and prosecuted on indictment in the usual manner.



## CHAPTER XI.

### THE RATING OF COLLIERIES.

THE incidence and burden of the poor-rates and other rates collected under that name upon collieries and their appurtenances, is so important a matter as to claim special study and examination from every writer on that kind of property. In this chapter it is intended to point out the statutes which bear upon rating; and then to explain the meaning of rateable occupation; the principle or basis on which the rating ought to be settled, with the practical application of the principle to some particular cases. Some extracts from the leading cases which serve to throw light upon the various points will be quoted in support of the propositions advanced.

By the statute 43 Eliz. c. ii. s. 1, it is enacted that the churchwardens and overseers or the greater part of them shall take order from time to time, by and with the consent of two justices of the same county, whereof one to be of the quorum, dwelling in or near the same parish or division where the same parish doth lie, to raise weekly or otherwise, by taxation of every inhabitant, parson, vicar, and other, and of

every occupier of lands, houses, tithes impropriate, proprietors of tithes, coal mines, or saleable underwoods in the said parish, in such competent sum or sums of money as they shall think fit for the relief of the poor.

Coal mines are thus expressly made liable to the poor-rate.\*

By the Union Assessment Committee Act of 1862, provision has been made for securing uniform and correct valuations of parishes in the unions of England. For this end the board of guardians appoints not less than six nor more than twelve of their number to be the "Assessment Committee" of the union for the investigation and supervision of the valuations of rateable property. It is not necessary to refer more particularly to the enactments of that statute, which has no important bearing upon the principle and method of rating collieries. It will indeed secure a *uniform* rating according to some one system throughout all the collieries comprised in any union, but it does not affect to determine what that system shall be.

Although the statute gives authority to the officers of the parish to rate in such a sum as they may think fit, it does not import that they may arbitrarily impose the rate. They must rate the occupier fairly and justly, according to the value of his occupation, and with reference to the rating of others. The party rated may appeal against the rate on the ground that

\* By the Rating Act, 1874, *all* mines are now rateable on the same principle as coal mines, except lead, tin, and copper mines; the method of rating which is specially mentioned in the statute.

he is over-rated himself or that others are under-rated. The statute 6 & 7 Will. IV. c. xvi. enacts that the assessment upon lands, &c., is to be made upon an estimate of their net annual value, which is defined to be the rent at which they might reasonably be expected to let from year to year free of all tenants' rates and taxes and tithe commutation rent charge, if any, and deducting the probable average of annual costs of repairs, insurance, and other expenses which may be necessary to maintain the premises in a state to command such rent.

It will have been seen that the rate is to be by taxation of every "occupier" of coal mines, &c., and it is, therefore, necessary to state in general terms who are to be considered as the occupiers of this description of property. The occupier intended is the actual tenant, and not the lessor. The rate is to be levied upon and demanded from the "occupier," but as "rent" is by the statute made the basis of the rate, it is substantially a landlords' burden. When an owner is also the occupier by himself, his agent or servants, then he is personally rateable. A question may occasionally, though rarely, arise as to who is the person who ought legally to be rated. If the person in occupation be a lessee, there can be no doubt that he is the occupier, as the lease conveys to him an exclusive interest in and possession of the property demised. But a *licence* to work minerals is distinguishable from a lease, and is only an incorporeal hereditament, or mere right. Yet as it confers a right to enter, work, and carry away part of the land itself, viz., the minerals, it seems clear that such a right as this is an interest in land.

If the grantee of such a right has an exclusive possession of the workings, as against the grantor and all other persons, he is to all intents and purposes the occupier of the colliery, and rateable. In the case of *R. v. The Trent and Mersey Navigation Company* (4 B. & C. 57), that company had agreed with the owners of certain limestone quarries that the latter should deliver to the company such a quantity of stone as the company should yearly direct at a certain price; and in case of neglect or refusal, it was to be lawful for the company to enter and take away as much stone as they thought proper, paying for it at a reduced rate. The company afterwards did enter and work the quarry, and were rated for the property. The case was sent back by the Court of King's Bench to the Quarter Sessions to ascertain whether there had been an *exclusive possession* by the company. Upon the affidavits, however, the Court thought that the right of the company was merely to get what stone they might think fit. and that there was nothing in the contract to prevent the owner from giving to others also the privilege of getting stone in the quarry. The company had not therefore any sole and exclusive occupation, but a mere privilege, and consequently were not liable to be rated.

The point cannot be said to be clearly settled, but it would probably be now held that the grantee of a licence to work minerals which conferred an *exclusive privilege* as against all others is the proper person to be rated as the occupier. For if he could not be legally rated, it is difficult to see what other party could be.

This view is supported by the late case *Kitson v. Guardians of Liskeard Union* (10 Q. B. 7). It was the case of a "cost-book" mine company, working under a licence from the owners to dig for ore and erect sheds, &c., on surface lands. It was held that they were the sole occupiers and rateable, and that it was immaterial what title, if any, was conferred by such grant. But where the owner of minerals grants a licence to work them without the exclusive occupation, it may be argued that that owner is the occupier in law, and the assessable value would be what a tenant would give for the land *with all the advantage* derivable from the working licence.

In the case of *R. v. Tremayne* (4 B. & Ad. 162), the owner of land had granted to certain persons a liberty to dig for ore, receiving £1 15s. for every ton of manganese raised during the term, free of all expense. Mr. Tremayne was assessed in respect of the sums he received. But the general principle was clearly laid down by Mr. Justice Patteson, who said (adopting an earlier decision), "Where a person receives without risk part of the produce extracted from the bowels of the earth, he is an occupier of land; but when he merely receives a rent or money payment, then he is not an occupier. Here Mr. Tremayne was not the receiver of what is extracted from the bowels of the earth, but of money; he is therefore not liable to be rated as an occupier of land."

The next point relates to the position of the occupier with respect to the value of his occupation. There is no doubt that the occupation must be *beneficial*, or rather, profitable, in some sense; that is, some

advantage and profit must attend it, and consequently, if a colliery is shut up, and not worked at all, it is not, during that period, rateable. But in order to show a right of exemption from rating, it must be proved that the occupier *receives nothing from the property for himself or for anybody else*, and that *if he were assessed he would have no funds out of which to pay the assessment, except resources not drawn from the property in question*. A recent case (*Jones v. Mersey Docks Board*, 35 Law Journ., M. C. 1) has decided that if the occupation is such that it does produce profit—that is, if it is capable of yielding a net annual rent above the average annual cost of repairs, insurance, and expenses necessary to maintain the concern in a state to command such rent—the property is always *prima facie* liable to be rated. It is immaterial whether the profit is retained, or whether it is paid over to a charity or a trustee, *or any other person*, provided the occupation is such that if it were demised to a tenant paying a rent, a rate must be put upon it. But in order to show that there is a benefit, there must be *some justly estimated rent*, and if the property is not let, that rent must be such as a hypothetical or imaginary tenant would give if he occupied it. These propositions are mainly taken from the judgment of Lord Blackburn in the case of the Corporation of Lincoln *v. Overseers of Holmes Common* (4 Cox's Mag. Cases, 457). And in the later case *Mr. Justice Mellor* is said to have observed that the effect of the case of *Jones v. Mersey Docks Board* is that the occupier of property which is *valuable* is *rateable up to its value*, whether or not he receives the value to his

own use ; whereas it had been previously supposed that it was only a beneficial occupation that was rateable. In other words, the *property must be valuable before it can be rateable, though it may yield no value to the actual occupier*. In applying these propositions to a colliery it is evident that the *occupier* of a coal mine is *not rateable for it before it is worked and productive*. So also, if the *workings are exhausted* and “*the subject matter of profit is utterly gone, it is not rateable, though the rent which was probably calculated upon the average produce of the whole term be still payable*.” But with respect to the parish he is only rateable for the concurrent annual value during the period for which the rate is made ; and when the thing which he occupies no longer affords any such concurrent value, the subject matter of the rating is gone.” So spoke Lord Ellenborough in the case of *R. v. Bedworth* (8 East, 387).

Therefore it appears that if competent persons come to the conclusion that, under the special circumstances of the colliery, no rent could be obtained, if it were in the market to be let, then that colliery would not be liable to be rated at all. The case of *R. v. Parrott* (5 T. R. 593) may seem at first sight to be in conflict with the above proposition, because the *colliery* was a losing concern in the hands of the occupying tenant. But Lord Ellenborough, in the case of *R. v. Bedworth*, expressly distinguished that case from *R. v. Parrott*. He said, “There the subject matter itself was profitable and produced value to the owner, though the immediate owners derived no profit from it. But here the mine itself is exhausted, the subject matter of profit is gone,

although the rent, which was no doubt calculated upon the probable average produce of the whole term, is still payable."

In the case of *R. v. Parrott*, the facts were that certain persons were in possession of a colliery under a lease by which they were bound to work the colliery, and pay *a sixth part* of the money produced by the sale of *coals, without any deduction*, to the lessor. Upon an average of the last three years they paid £3,001 15s. 7d. as such sixth part, and *lost two and a half farthings on every ton of coals*. The colliery was *always a losing concern* from the first. But Lord Kenyon, C.J., said, "Suppose a landlord makes so hard a bargain with his tenant that the latter derives no benefit from the farm, must not the tenant be rated to the poor? The landlord certainly is not liable. It appears in this case that there has been a clear profit of £1,000."

It seems, upon the whole, that so long as any profit is realised by the owner or occupier out of a subsisting subject matter which is legally liable to the incidence of the rate, so long will that property be rateable, although it may be a losing concern in the hands of some of the parties interested.\*

If these cases do not seem at first sight to be perfectly clear, they may be epitomised thus: If a colliery is absolutely unproductive, it is not rateable, though the lessees may by a bad bargain be bound to continue

\* Indeed, Mr. Lumley, in the latest edition of his work on Assessments," goes the length of stating that the principle of beneficial occupation as a necessary requisite to the liability to assessment has been overruled.



payments to the lessor. But if the colliery is at all productive and a rent is paid, the occupier is rateable, though the concern may be to him unprofitable. The question who is to be considered the occupier is a matter of fact, to be found, if disputed, by the Sessions, and the Court of Queen's Bench will hold themselves concluded by their finding.

The next and most important question is how and upon what principle or basis is the actual rateable value to be obtained. Here we approach the practical methods of rating collieries, and in dealing with this question the enactments of the Parochial Assessment Act must never be lost sight of. The poor-rate is imposed in respect of the net annual value of the property, which the statute proceeds to define to mean the *rent* at which the same might be *reasonably* expected to let from year to year, free of all the usual tenants' rates and taxes, and tithe commutation rent-charge (if any), and deducting therefrom the probable average of annual costs of repairs, insurance, and any other expenses which may be necessary to maintain the premises in a state to command such rent.

There are various methods by which the professional valuer seeks to arrive at the true rateable value of collieries. In practice, all minerals are let on lease for long terms of years, under which the lessees covenant to pay certain dead or sleeping or minimum rents and royalties, or mine rents, on all quantities worked beyond the quantities specified to be worked in consideration of the fixed rents. The lessees also covenant to pay annual rents for all land taken for the pits, buildings, and plant, and to sink the pits or drive the adits

and levels, and erect the necessary buildings and engines.

In working out a valuation the professional valuer seeks correct information as to the following particulars of each colliery he is employed to value, namely, the dates of leases, the royalties paid, the names and thickness of seams, the description of coals worked, the quantities worked from each parish or hamlet, the area of surface land occupied by the collieries, names of shafts or levels and their depths, nominal horse-power of winding, pumping, and hauling engines, diameter of pumps, mode of ventilation, length of sidings and railways, number of weigh-bridges and coke-ovens.

Having obtained this information, and having fully weighed the particular circumstances of each colliery, he estimates the royalty which, if the colliery were then to be let, the owner might reasonably expect to obtain. The leading circumstances which determine it are the situation, facilities of sale or shipment, quality, and probable cost of working.

Coal mines must be valued, like land, on estimates of the probable produce that may be properly expected to be worked at the time of the valuation, which calculation must have reference to the produce of the colliery in the year preceding the valuation. The rent is not to be extravagant or exceptional, but a reasonable rent, which is to be the measure of annual value.

Having arrived at the fairest estimate of the royalty obtainable at the period and under all the circumstances, the valuer will proceed to add his valuation of the shaft, buildings, and machinery, and of the surface lands occupied for the purposes of the colliery.

The case of *Guest v. East Dean* (Law Reports 7. 2. B. 334), is the leading case on these ratings. It supplies the principle for the assessment of surface land and buildings connected with works. The judgments of Lord Chief Justice Cockburn and Lord Blackburn in this case are valuable expositions of the law, and the Editors think it is expedient to quote them at some length.

The case was that of an iron mine, where two and a half acres of surface land were occupied together with the mine, the surface being used for the purpose of working the mines and getting the ore, and the lessee had erected upon those acres buildings, machinery, workshops, and tramways. The surface land and buildings, &c., without the mine, would have been practically valueless. It was decided, that though at that time the mine itself was not rateable, the land, buildings, &c., were rateable at the enhanced value which they had as being of utility for the working of the mine. "Suppose by testamentary disposition of an owner in whom the entire soil surface as well as minerals had been united, the mine and minerals had been given to one person and the surface to another. The owner of the minerals, if he desired to work them, would have had to make his bargain with the owner of the surface to obtain from him the right to use it for the purpose of mining operations. In this case the appellant united in himself, though in different titles and interests, the ownership of the surface and that of the mine. He has brought the surface into a state in which it is no longer available for agricultural purposes, but it is available for the

tramway and various buildings which are necessary for the working of the mine. Suppose they were not in the hands of the same individual, and the appellant was obliged to say to the owner of the surface, 'Upon what terms will you let me the surface that I may use it in its now present condition for the purpose of the mine?' It is clear that the surface, by reason of its usefulness for his purposes, would have a given value to be rented and used by the owner of the mine below, and no one in whom the surface was vested would allow the mine-owner to have the use of it except for a substantial consideration. . . . You are to take all those benefits that the hypothetical tenant would have by having the property let to him, and you are to set against it all that he would have to pay and discharge in order to get that benefit, and allow him a fair tenant's profit, and then the balance would be the rateable value. That is a difficult thing to do, but it is repeatedly done, and has been done in railways and other things of that sort when there is no real tenant at all." The formal rule drawn was as follows: "That the appellant is liable to be rated in respect of the surface land, with the buildings, machinery, plant, tramways, and other workshops connected therewith . . . that the principle on which the surface land with the buildings, &c., is to be rated, is to assume the mine and the surface to belong to different owners, and then say what rent the owner of the mine would give to the owner of the surface for the surface land, *with* the buildings, machinery, tramways, &c., upon it."

In attempting to state simply and clearly the best

method of arriving at the rateable value of a colliery, it must be premised that the Courts have settled some points that had once been in controversy. The following proposition has been clearly laid down by the Court of Queen's Bench, and governs every case of rating :

“We are of opinion that the standard of value adopted by the legislature is the *value of the property to the owner*, whether it remains in his own occupation, or is let to a tenant.” (R. v. Wells, Law Rep. Q. B. 1367, p. 574.) The rate falls in the first instance upon the occupier of the colliery, but the definition of annual value in the Assessment Act, and the law laid down by the Court, restrain the valuer from imposing the rate upon the commercial profits of the whole concern in the hands of the occupier. Those profits would indeed be the annual value to him, but the statute defines its annual value to mean a certain ascertained “rent.” Hence it follows that it is only such profits as are fairly the landlord's share, as indicated by the meaning of the word “rent,” which constitute the *rateable* value. The real annual value of the territorial hereditament is the object to keep in view, and should be kept separate from the capital employed to carry on the work. That capital is not rateable unless it has been laid out in such permanent erections and machinery, &c., as would pass in a demise as part of the concern. The occupier is rated because he is the visible person in possession and occupation, and the old statute casts the rate upon him. But the rule ought to be kept steadily in view that so much of the occupier's capital as is involved in the

mere carrying on of the business is a distinct item altogether, and the Union has no claim to any assessment upon that amount. The best notion of the proportion of profit which is liable to the incidence of the rate is to be obtained from the definitions of the word "rent," which is the governing word in the statute, and cannot be omitted from any calculation. Rent is defined by Malthus to be "that portion of the value of the whole produce which remains to the owner of the land after all outgoings belonging to its cultivation, of whatever kind, have been paid, including the profits of the capital employed estimated according to the usual and ordinary rate of profits of agricultural profits at the time being." It is defined by Ricardo as "that portion of the produce of the earth which is paid to the landlord for the use of the *indestructible* powers of the soil," and he adds that it is often confounded with the interest and profit of capital. Such is the idea of "rent," which is the measure of the "net annual value," upon the estimate of which the assessment to the poor-rate is to be made.

*Improved Value.*—Another proposition has been distinctly laid down and variously illustrated by the Court of Queen's Bench, namely, that in arriving at the rateable value of a colliery the present improved or augmented value must be the test. It is quite clear that all existing bargains, agreements, and arrangements must be deemed as being at an end for the purpose of valuing the property. The landlord must be supposed to let *the works in their actual condition and circumstances* in and for the current year. It is not the seams of coal alone that are to be

taken into the calculation, as is the case between the lessor and the lessee at the commencement of most leases. The Union has the right of drawing into the valuation all the machinery, staiths, buildings, way-leaves, and other incidents of a similar kind which have rendered the mine itself more fruitful and valuable. The royalty reserved and paid by virtue of the lease is, doubtless, one criterion, and an important one, of the landlord's share of the profits of the mine, but it may not represent the *entire* rateable value of it. The capital expended in fixed machinery and permanent erections becomes subject to assessment in the hands of the lessees, upon the ground that those additions or annexed properties become part and parcel of the concern as it stands, and would pass, unless specially excepted, in a demise of the colliery to a new lessee. A parish cannot have a standing or permanent rate, because the value of property, especially of mineral property, fluctuates from time to time, and consequently the proportions fluctuate. And it is of the very essence of the rate that the proportion of the burden borne by one ratepayer should be equal and just with reference to the rest. The tenant must be supposed to take the works from year to year at the date of the rate, and to undertake to keep them in their present condition, so as to command the rent he binds himself to give; and it may be concluded, upon the authority of a dictum in the case of *Clive v. Foy* (2. Q. B. Div. 1875), that in assessing property *not let* the rating officer may take into consideration the number of years it may reasonably be expected to let for. Upon that supposition the valuers ascertain, to

the best of their ability, what amount of royalty (which is the ordinary form of payment to the lessor), such a tenant would pay, and that gives the gross estimated rental from which the deductions to be presently referred to would be allowed. For example, if a house was let last year at £25 per annum, but is now let at the improved rent of £35, the rate of the current period must be made upon the latter sum. As a general rule, wherever the value of the occupation is enhanced by collateral circumstances arising out of the occupation itself, and not merely personal to the individual occupier, such improved value is that upon which the rate should be made, as where the value is increased by the annexation of machinery fixed to the freehold. (*R. v. Haslam*, 17 Q. B. 220.) Thus, where a rate was appealed against because the appellant was rated on the full value of his occupation, but a gentleman who had bought an estate which he occupied himself was rated at £29 a year, though he had improved it to the value of £175 a year, the Court held that the latter sum was the rateable value. And in the case of *R. v. Attwood* (6 B. & C. 277), it was laid down that "if the tenant of a mine expends money in making it more productive, that is the same as expending money in improving a farm or a house, in which cases the tenant is rateable for the improved value." In short, it must never be forgotten that the propriety of a poor-rate can only be determined with reference to the facts found to be actually existing when the rate is made.

It may be argued that, looking at the *entire* period covered by a lease, with the good and the bad incidents



to which in forty or fifty years the colliery is liable, the actual bargain may be the best measure of rateable value. But in practice, it would often work inequitably to one party or the other if the valuer for rating were to be bound by the original bargain. For example, the owner of coal in the North let a large area for forty years at  $3\frac{1}{2}d.$  per ton. The tenant worked part of it, and sub-let another part at  $1s. 9d.$  per ton. Thus if the bargain had been adhered to for rating purposes, one colliery would have been rated on a  $3\frac{1}{2}d.$  royalty, and the other colliery on the same estate at  $1s. 9d.$  And the doctrine of a re-adjusted royalty seems to imply also a claim to an occasional *reduction*, as well as an occasional increase, of the actual royalty, according to the evidence of current market value. The occupier may have met with faults or inundations, or the seam may have fallen away, or the demand have become less. Evidence of such circumstances may force the valuer for rating to conclude that the original rating was too high. And proof of enhanced prices and greater profits may induce the opinion that a higher royalty could be reasonably obtained if the colliery were again to be let. The valuers are bound by the statute, and if upon evidence they increase a royalty above that reserved in a lease, so upon sufficient evidence they must also reduce it. The royalty fixed at the commencement of a lease must ever be in the nature of a speculation. For example, the royalty of  $8d.$  may be too small a share of the profits for the lessor, when the coal lies close to the bottom of the shaft; though it may be too large a share in the last years of the lease, when miles of roadways have to be

ventilated, and the coal is dragged over a great length of tramways. If it is made to appear clearly that no new tenant would come in and give the actual royalty in the current year, it is manifestly just that the occupier is, for rating purposes, not to be more bound by that excessive royalty, than the rating officers are tied to an inadequate one. Two principles are brought out by the statute, namely, that the poor-rate is really, though not nominally, a landlord's burden, measured by his proper share of the annual proceeds of the tenement, and secondly, that the valuation is to be taken, not as from the commencement of leases, but in the current year of rating. The first is indicated by the word rent; the second by the phrase "from year to year."

The difficulties connected with the adjustment of royalties would be obviated by adopting a kind of sliding scale, and fixing them at one tenth or one twelfth, or some other proportion of the selling price. The Editors are informed that this method is actually adopted in certain mineral leases granted by the Duchy of Lancaster, by the Earl of Warwick, and other proprietors. In some cases also of collieries worked by ironmasters, the lease provides that if iron is quoted below a certain figure, ten per cent. shall be deducted from the royalty on coal, and if iron rises above a certain figure, ten per cent. shall be added. Considering the variation in royalties between pit and pit, though adjacent to each other and working the same seams, it would tend to avoid many expensive controversies if an equitable arrangement of this kind were generally adopted, and would furnish a fair basis for rating without further investigation into the particular concern.

Ordinarily the whole history of the colliery comes under consideration, because each yields a fixed royalty, which may be too high or too low, and varies from pit to pit. "It may be taken as a fact," says Mr. Hedley, "that coal workings have now well-ascertained local values," which enables them to be bought and sold or let with as much certainty as many other properties. This local value, at a certain distance from port, forms a basis to start from, and the actual valuation is modified by the circumstances of pits, levels, haulage, water, faults, &c. The Court to which evidence of this kind is offered on appeals is, of course, often ignorant of such details, but accepts and considers, and between the tendencies to augment value on one side and diminish it on the other, is apt to strike a compromise between the two. Local customs of letting coal are noticed at the end of this chapter.

*Legal Deductions.*—The next point for consideration is whether any and what deductions from the gross estimated rental of a colliery are recognised by law, and sanctioned by the judgments of the Courts. Whatever deductions are claimed must always be strictly covered by, and referable to, the language of the Poor Law Assessment Act. The rate, as we have said, is to be made upon an estimate of net annual value; that is, the rent at which the property can be reasonably expected to let from year to year (or for such a time as under the circumstances it can be let) *free* (1) of usual rates and taxes, and (2) tithe commutation rent-charge, and deducting therefrom the probable annual average cost of (3) repairs, (4) insurances, and other expenses, if any, necessary to maintain it in such a state as to command

such rent. In settling the amount of royalty which a tenant may be expected to give, when royalty is taken as the test of value, the rates the occupier will have to give are an element in the calculation, and the valuer assumes that the royalty will be paid without any reduction on that score. No other deduction can be made under the statute from the royalty on tons of coal.

Thus, in the case of a mining company, in which Sir F. Herschell acted as arbitrator, he refused to allow any deduction from the gross estimated value so far as the rent *of the mine itself* was concerned, and he awarded that £31,250 was the gross estimated value, and also that the same sum of £31,250 was the rateable value. The deductions sometimes made for insurance and tithe commutation require no comment, as they are not applicable to coal, and there are no "other expenses necessary to maintain the property (that is, the coal seams) in a state to command the rent."

Having disposed of the rating of the coal, we come next to that of the premises occupied for the purpose of working out and disposing of the produce of the mine.

It has been seen that the lessees and occupier are also rateable for the surface lands in their occupation, and also for the buildings, engines, and works, which they construct for the purpose of working the mine, including the shafts, pumps, machinery, reservoirs, and water-courses. In valuing these properties, the value ought, we think, to be based not upon original cost, but on their value as they stand. In the case of *Guest v. East Dean*, Lord Blackburn said: "It is not

what it costs, but what its value is as it stands." In this class of rateable property some deductions must be made in accord with the provisions of the statute. In the first place, it is enacted that the rent, which is the test of rateable value, is to be free of—that is, discharged from, and reaching the landlord without deduction for—the usual tenants' rates and taxes, and tithe commutation rent-charge, if any. In other words, the valuer is to assume that these out-goings are paid by the tenant, and he fixes the rent on that supposition. The principal deduction, properly so called, is the amount found by experience to be necessary and proper for ordinary annual repairs, and for a reasonable allowance for a depreciation fund, for the purpose of replacing such parts of the plant as must from time to time be worn out. This deduction is authorised by the statute under the head of "other expenses" necessary to maintain the property in a state to command the estimated rent.

In some cases attempts have been made to work out the valuation of collieries on the principles laid down for rating railways—that is, by taking the receipts, deducting the expenditure, and making a further allowance for interest on floating capital and tenants' profits; but it has been found that such inquiries were felt to be inquisitorial, and were attended with so many difficulties as to what were really working expenses and tenants' capital, that this system cannot be recommended.

The following is a formula of the valuation of a colliery on the principle indicated above :

	Capital Value.			Annual Value.		
	£	s.	d.	£	s.	d.
Land - - - -				60	0	0
Royalty - - - -				4,105	0	0
Estimated value of shaft, buildings, and machinery	94,000	0	0			
Annual value thereof, cal- culated at $6\frac{1}{2}$ per cent. -				6,110	0	0
203 houses, as per scale -				378	0	0
				10,653	0	0
Rate at 1s. in the £, £532 13s. 0d.						

From all the foregoing considerations, and giving due weight to the various authorities which the author has been able to consult, and keeping in mind the present enactments of the law, he arrives at the conclusion that the present legal basis for rating a colliery is a royalty adjusted, from time to time, by a reference to all the existing circumstances of the individual case. It may be a difficult calculation, but it is not beyond the powers of skilled and candid men. It is probable that every period of five or six years would make an appreciable difference in the amount of royalty that the imaginary tenant ought to give for the current year, and a readjustment ought consequently to be effected. It may be asked why the royalty fixed by the stipulations of the lessor and lessee should not

be taken as the best test of the landlord's share of the profits. The answer is that the assessment committee is entitled, as the law now stands, to take into the calculation the value of the capital which has been expended upon the mine, and upon fixed machinery and buildings. They are also entitled to assume a tenant coming in that very year to enjoy all the existing advantages. It may be that the landlord was desirous of encouraging the adventure, and was content with a very low royalty, say sixpence per statute ton. It cannot be disputed that there are hundreds of cases where a new tenant would gladly take the place of the original lessee with the burden of double or treble the original royalty. It may be said that a royalty is not, strictly speaking, rent. No doubt it does not fall accurately under the definition of rent, and some of the legal incidents of "rent" may be wanting. But inasmuch as it is the ordinary mode by which the lessee of this rateable property transmits to his landlord the landlord's share of the profits, it must be taken as the best available means for estimating the net annual value. "Royalty," says Mr. Lumley, "must be considered as rent." Mr. John Taylor, who has great experience in these matters, says: "I look upon it as a rent precisely." It is undoubtedly an exceptional and anomalous system. It is adopted as a basis of rating under the pressure of custom, legal enactments, and natural circumstances. The vast majority of the owners of coal demise the right to cut it in consideration of such and such royalties per ton or "ten." Then the statutes insist that the occupier shall be rated, and that the rateable value shall be the

net rent which a tenant would give for the current year. The rateable subject-matter differs from every other rateable property, except a brick-field, in the circumstance that it is not annually fructifying, but is being annually destroyed. Then again, no person does in practice ever take a colliery from year to year. Here is a combination of incidents which sets at defiance every normal plan of striking the rate. All that can possibly be done is to approximate, as nearly as may be, to the sum which the prospect of a commercial profit upon floating capital might reasonably be expected to induce an adventurer to give, in the customary form of royalty, for the right to come in and work the coal with all existing appliances. It might indeed be contended with reason that the supposition of a rational person offering to take a colliery from year to year is too absurd to be entertained. It would, doubtless, be so if it had not been distinctly laid down by the judges that it is legitimate to assume that such an adventurer need not be supposed to limit his view to the current year, but ought to be supposed to look forward to the diminution of the corpus of the property every year, and to have his eyes open to the chances of continuing as lessee, and the probable duration of the seams, &c. He would probably bind himself to pay some fixed, certain, or dead rent. But *a rent of this kind*, which is part of the usual contract between lessor and lessee of coal seams, is *not the criterion of annual value*. It is generally intended to operate not as the full rent of the colliery, but *as a security or guarantee* that the seams taken will be properly worked. The sum reserved per ton is always the main source of benefit to



the lessor in a prosperous colliery in full working and let upon this system. As to the system of letting coal by the acre, with a covenant to work so much every year, Mr. Hedley informs us that the method of rating such property is substantially the same as in other cases. The rent per acre is determined by the thickness of the seams. Every acre of coal a foot thick is assumed to produce at least 1200 tons of saleable coal.

With respect to the system of rating upon royalties, it may be said that the amount which reaches the landlord is very small in comparison with the selling price of coals, as where the royalty is 7*d.* or 8*d.* and the price 6*s.*, and that the rate is consequently placed upon too narrow a basis. But the answer to this objection is given by Adam Smith, who says that rent has generally a smaller share in the price of coal than in that of most other parts of the rude produce of land. "The rent of an estate above ground commonly amounts to what is supposed to be a third of the gross produce, and it is generally a rate certain and independent of the occasional variations of the crop. In coal mines a fifth of the gross produce is a very great rent, a tenth the common rent; and it is seldom a rent certain, but depends upon the occasional variations in the produce." Labour, interest upon capital expended, and ordinary tenants' profits, make up the greater part of the price demanded. From this and other passages in his work it is clear that this eminent writer considers the small and uncertain amounts which find their way into the landlord's pocket as in the nature of a reasonable rent. This point has also received much elucidation from a judgment of the

Court of Queen's Bench in the cases of *R. v. Westbrook* and *R. v. Everett* (16 Law Journ. M. C. 87, and 10 Q. B. 178). The question raised was the proper mode of rating the occupiers of brick-fields. It is obvious that there is much similarity between the case of a brick-field and that of a colliery. The tenancy of the brick-field was of some years' duration, and the rent in part fixed, and in part made to depend, in the nature of royalty, on the number of bricks made. The material, the brick-earth, is not in its nature renewable, and would be consumed in no great number of years. In short, the very corpus of the estate, as in the case of a colliery, was being gradually removed. The basis of the rate was the supposed total amount paid to the landlord, considering as well the royalty as the fixed sum to be rent, and to be the proper criterion for assessing the amount which a party may be reasonably expected to pay as rent from year to year, free of such charges as the statute allows to be deducted. It was objected to the rate that it was wrong to conclude that, because there were so many stools on the ground from which so many thousand bricks may be made in each year, that so many will in fact be made and paid for. This objection would equally apply to a colliery, because the rate is always made prospectively upon an estimate of probable produce derived from past returns. But the Court said that "the parish officers might well look to see what probably the land would produce in the current year. They may as well proceed with a brick-field" (and therefore with a colliery) "as they would with land used for agriculture. They cannot in that case tell

how much produce will be raised, still less at what price it will be sold. Yet if the tenant occupies at a rent to be ascertained in each year by the actual produce and price, as it well might be, they may reasonably infer from the nature of the premises, the cultivation, and the preparations, what would be the rateable value in a given year. The next objection is that it is altogether wrong in principle to consider royalty as rent; and this appears to be founded on this, that it is a sum paid, not in respect of the renewing produce of the land, but of a portion of the land itself, and that not consumed by slow degrees, to be exhausted at the end of a long period—as in the case of a coal mine, under which circumstances, it is admitted, it might be treated as produce—but in such large proportion that in a few years the whole will be consumed. It does not seem to us that the more or less rapid consumption can make any difference in principle; the rate is always imposed in reference to the existing value—whether temporary or permanent is immaterial. The case was supposed of a brick-field being worked out in a single year to meet a contract for a public work. The consequence would be, the land would have a much increased value for that year, and it would be reasonable it should bear an increased rate for that year, though in the following year its value might sink almost to nothing, and the rate would fall in proportion even to nothing, if the brick-earth were exhausted, and therefore, like an exhausted coal mine, should become entirely used up. If this were not so, an obvious injustice would be done to the other ratepayers. The royalty is a sum which, after

expenses paid, the occupier can afford as a rent to the landlord. When the case is thus laid bare, there is no distinction between it and that of a lease of coal mines, &c., in respect of which the occupation is only valuable by the removal of portions of the soil; and *whether the occupation is paid for in money or kind, and the amount is fixed beforehand by the contract, or measured afterwards by the actual produce, it is equally in substance a rent*; it is a compensation to the landlord by the occupier of the piece of land for that species of occupation which he contracts to give. We are brought, then, to the conclusion that the parish officers have done right in considering the royalty as a portion of the rent, and we see no objection to the conclusion at which they have arrived, that *primâ facie* the amount of royalty reckoned in the rate will be paid in the year for which the rate is made. Still it must be always remembered that the ultimate question is that propounded by the statute; and therefore the amount that has been paid, and which it is reasonable to infer will be paid, *is only evidence*, and not the fact itself to be ascertained. When, therefore, the case came to the sessions, it was open to the appellant to prove such uncertainty in the market, and also all such circumstances as showed that the parish officers had done wrong in concluding that from such a quantity made, or expected to be made, the land might reasonably be expected to let from year to year at a rent measured by that quantity. . . . The true question is, what is the rent at which the land might reasonably be expected to let from year to year, remembering the

purposes to which it is to be applied, and the privileges which the tenant will enjoy under his contract and by reason of the occupation, and after making all the deductions required by the statute."

## SUMMARY OF RATING LAW.

It may be convenient to repeat in a shorter form the leading propositions relating to the subject.

(1) *As to when a Colliery is rateable.*—The occupier is not rateable before the workings are commenced. But if the colliery produces value to the *owner*, whether the actual occupier makes a profit out of it or not, it is rateable. This proposition rests on the principle which is the guiding light, under the present law, to all rating, namely that the poor-rate (now including certain other rates) is a local tax *upon owners*, though collected from and assessed upon occupiers. The rateable value, described in plain terms, is the sum which a tenant may reasonably be expected to give annually for the privilege of working the coal, and applying his capital in the business.

If the mine is exhausted the source of profit is gone, although the rent may, under special stipulations, be still payable.

(2) *Improved Value.*—The occupiers of collieries are rateable in respect of the *improved* value of the workings, just as the occupier of a house who spends money in adding to it is rateable on the augmented value, because it would command a higher rent. It is immaterial whether the improvement is made by the occupier or owner.

(3) The surface land, the shaft, and buildings, &c., occupied with the colliery, must be rated separately, and in the parishes in which they are situate.

(4) *What constitutes a Rent.*—Whether the occupation is paid for in money or in kind, and the amount is fixed beforehand by contract or measured afterwards by the actual produce, it is equally in substance *a rent*. (R. v. Everest, 10 Q. B. 178.)

(5) The coal, *per se*, like land, has an ascertained local value determined by the situation, quality, probable amount of capital required to win it, and probable cost of working it.

(6) The rent is not to be an extravagant or exceptional one, but a reasonable rent, which is to be the measure of annual value. Collieries must be valued, like land, on estimates of the probable produce that may fairly be expected to be worked at the time of the valuation, and not with reference to the profits of a particular year.

(7) The buildings, machinery, and plant should be valued according to their capacity and fitness for the purpose for which they are designed, and regardless of the *actual* cost, but with reference to their present value. Thus if a building cost £13,000, and could now be erected for £5000, the latter is the measure of value, not the former.

(8) In valuing the buildings, fixed plant, &c., the simplest method seems to be to assume a hypothetical tenant, and consider what he might reasonably be expected to pay in addition to the royalties or mine rents (paid for the minerals), by way of remuneration or fair interest on the capital invested in the shaft,

buildings, engines, and other *fixed* plant necessary for winning and working the coal.

(9) It is admitted that collieries will not let from year to year, and can only be let at yearly rents for a term of years. They ought therefore to be rated on the rents at which they might reasonably be expected to let for such a term of years, and the rent is not to be estimated on the profits or losses of a particular year.

(10) The royalties actually paid for minerals are not conclusive evidence of value, but must be estimated, free of the stipulations of leases, at what the coal would reasonably be expected to let for under existing circumstances.

(11) *As to Deductions.*—It is enacted that from the gross estimated rental must be deducted the probable average annual cost of repairs and insurance and other expenses, if any, necessary to maintain the hereditaments in a state to command such rent.

There is nothing to deduct from the royalty which reaches the hands of the landlord. But as to the other property, such as land, fixed machinery, &c., the gross estimated value will be the rent plus the average annual cost of repairs, renewal, and insurance undertaken by the lessee, and the rent he pays after deducting those items will be the rateable value. In practice the lessor rarely repairs, but if he does, these statutable deductions may be made from the rent in order to get at the rateable value.

(12) *Rating Collieries not being worked.*—This depends on the special circumstances. If from badness of trade they cannot be worked, and no royalty

or rent reaches the owner, the land and buildings, as warehouses for machinery, would alone be rateable. But if a colliery can be worked and the lessee does not choose to work it, then it would be rateable at the rent at which it might reasonably be expected to let to another to work it. If a colliery is not worked temporarily on account of repairs or accidents, or a strike, it will, we presume, be rateable on its full value, as such risks are contemplated when the bargain is made.

(13) *Coal in one parish, and the shaft in another.*—When this is the case, the land is rated at its improved value in one parish, and the coal *per se* in the other.

(14) *Coal under the sea.*—The parish extends to low water mark (31 & 32 Vict. c. cxxii.), and the coal is rated accordingly in the parish. But as to coal beyond that mark under the sea, it is, we think, extra-parochial and not rateable *per se*. But the ways and tram-roads, which carry it away on shore, will be rateable at a value enhanced by such carriage.

(15) Lastly, the rateability of rights of way (known by the term “way-leaves,” and “out-strokes,” in different districts), remains to be considered. It was decided by the case of *R. v. Jolliffe* (2 T. R. 90), that the lessee of a right of way over the land of another, paying for it so much per ton for the goods carried over it, is not rateable as an occupier; such way-leave being a bare right of passage (which is an easement, and not a grant of the profits of the land), is not rateable for such a right. For a mere easement is not rateable, the land having been before rated in the hands of the occupier of that land. But this case is distinguishable from that of *R. v. Bell* (7 T. R. 598).



There the Dean and Chapter of Durham had leased lands, reserving to themselves the right of granting waggon-ways over the lands so leased. They then leased certain waggon-ways to the appellants, making satisfaction to the original lessees for spoil of ground, according to the terms of the original lease. They constructed the ways, and prevented all persons, except such as were authorised by themselves, from using these ways ; they built bridges, &c., and erected gates which they locked, and opened only when their waggons were travelling. The ground through which the ways were made was let to tenants who received an annual compensation from the appellants, who were rated in amount as they were before the ways were made. Lord Kenyon, in giving judgment, said, *inter alia*, "The question here is whether the appellants are or are not possessed of property that is rateable to the poor, and on that point there can be no doubt. One ground of argument is that because the Dean and Chapter could only grant a way-leave, therefore nothing more than a way-leave passed to the defendants ; but we are not to inquire into the titles of the occupiers. If a disseisor obtain possession of land, he is rateable as the occupier of it. Without going through the different parts of the case which show an occupation of the ground by the defendants, it is sufficient to say generally that they clearly *appear* to be the occupiers." And Mr. Justice Grose said, "It is impossible to read this case without seeing that the defendants have the exclusive possession of this ground."

The general rule is clear, that no person can be an occupier unless he has the exclusive right to enjoy

some portion of the soil. The grant of an easement, such as a right of way, a right of common, or the privilege, not being exclusive, of taking stone from a quarry, does not constitute the grantee an occupier. In all such cases the person in possession of the land is deemed to be the occupier and rateable, and liable to be rated for the value of the land as increased by the use of it.

But though no person can be rated as the occupier of an incorporeal hereditament, such as a right of way, yet when any interest in the land has passed to the lessees, which may give them a right to the exclusive occupation of any land in *connection* with the incorporeal right, then such lessees may be legally rated in respect thereof.

If such way-leaves run over different parishes, the principle of rating may be gathered from the railway decisions. It is settled that the proper mode is to ascertain the rateable value of the land occupied by the railway in each parish by the ordinary rules of assessment. The rateable value of any part in any parish must be taken from the net earnings in that parish, ascertained by a comparison of the profits and outgoings arising in that parish, and not with reference to the whole railway as one concern, and by division among the parishes according to the distance traversed in each. But any expenses, *wherever* arising, which are necessary for maintaining the property in any parish at the rateable value, may be taken into account.

*Duties of Overseers.*—These officers, with the churchwardens, or a majority of the whole number, are to

make the rate on the net annual value of the rateable property in the form prescribed by 6 & 7 Will. IV. c. xevi., and 25 & 26 Vict. c. ciii., with such variations as are required by 32 & 33 Vict. c. xli.

The overseers are to collect the rate from the persons rated. If a person do not pay when called upon, the overseers may obtain a summons from a justice of the peace requiring him to show cause why a warrant should not issue to levy the rate by distress and sale of his goods, and if no sufficient cause is shown the payment is enforced accordingly. The party summoned may show for cause that the rate itself is void, or that he is not liable. He may also appeal against the rate, and notice of appeal deprives the justices of their jurisdiction to distrain until the appeal is decided, unless the objection is solely on the ground of overcharge, in which case the warrant may issue for such a sum as the property was rated at in the last valid rate. The appeal against the rate on the ground of inequality, unfairness, or incorrectness in the valuation, may be to justices in Petty Sessions, from whose decision an appeal lies to Quarter Sessions. The appeal on these grounds may also be taken to the Quarter Sessions in the first instance. If the objection be to the liability of property to be rated the appeal lies only to the Quarter Sessions.

*Union Assessment Committee.*—Before any such appeal can be heard against a poor-rate for a parish included in a union to which the Assessment Committee Act applies, the appellant must give notice of the appeal and the grounds of it, and must have failed

to obtain from the Committee the relief he deems just.

*Local Customs of Letting.*—In the counties of Durham and Northumberland coal has usually been let at certain yearly rents for a specified number of “tens” of coal, with “tentale” rents upon all coals worked beyond the specified quantities. In Yorkshire and Lancashire the coal is let at yearly minimum reserved rents per acre, and acreage rents upon all coal worked beyond the quantities specified for the minimum rents. In other parts of England and Scotland, and generally in Wales and Ireland, the coal is let at minimum reserved yearly rents for specified quantities at a price per ton, and tonnage rents, or royalties, upon all coal worked beyond the specified quantities.

But in South Staffordshire, and some few places, the coal is let for certain rents and proportions of the selling price of the coal at the pit’s mouth, such proportions varying from one-sixth to one-sixteenth part of the selling price of the coal.

These various customs do not at all affect the principle of valuation to be applied to the properties in which they prevail, though they may to some extent modify the form of the calculations upon which the valuer works, or which he presents to a Court.

## CHAPTER XII.

### INJURIES FROM MINING.

THE respective rights of the owners of surface lands, and of the owners of minerals underlying such lands directly and laterally, have of late years been the subject of much discussion, and since the last edition several important cases have been decided in respect thereof, which will hereafter be noticed.

Injuries to surface lands from mining operations may be considered under three heads: (1) Where the relations between the owners of the minerals and surface are not governed by any contract. (2) Where they are so governed. (3) Where they are governed by Inclosure Acts.

We propose to consider these three heads in their order, giving cases illustrating each.

1. Where the relations between the owner of the surface injured and the owner of the minerals are not governed by any contract, the liability of the latter for injury is governed by different rules, according as the surface is or is not in its natural state; that is to say, is or is not encumbered with buildings.

The owner of the surface in its natural state is

entitled to have his surface supported in this state, and the mine-owner must so work his minerals as not to injure the surface. A leading case upon this point is *Humphreys v. Brogden* (20 L. J. N. S., Q. B. 10, 12 Q. B. 747). In that case the surface belonged to the plaintiff, and the minerals to the defendants, the Durham County Coal Company. No evidence of title appeared to qualify their rights of enjoyment. In the course of their operations the defendants had caused the plaintiff's surface to subside, and so caused injury to the surface. The Court found in favour of the plaintiff's right to recover. In delivering the judgment of the Court, Lord Campbell said "the jury have found that the company have worked carefully according to the custom of the country, but without leaving sufficient pillars or supports. We have to consider, when the surface of land belongs to one man and the minerals belong to another (no evidence of title appearing to regulate or qualify their rights of enjoyment), whether the owner of the minerals may remove them without leaving support sufficient to maintain the surface in its natural state. The case is relieved from the consideration how far the rights and liabilities of owners of adjoining tenements are affected by the erection of buildings, for the plaintiff claims no greater degree of support for his lands than they must have required and enjoyed since the globe subsisted in its present form. *We are of opinion that the owner of the surface, unencumbered by buildings, and in its natural state, is entitled to have it supported by the subjacent mineral strata.* These strata may of course be removed by the owner of them, so that a sufficient

support for the surface is left. Unless the surface-close be entitled to this support from the close underneath, corresponding to the lateral support to which it is entitled from the adjoining surface-close, it cannot be securely enjoyed as property, and under certain circumstances, as where the minerals approach the surface, and are of great thickness, it might be entirely destroyed. We likewise think that the rule, giving the right of support to the surface upon the minerals (in the absence of any express grant, reservation, or covenant), must be laid down generally, without reference to the nature of the strata, or the difficulty of propping up the surface, or the comparative value of the surface and the minerals."

In this case the injury was caused by working minerals directly under the surface injured. That the same liability attaches to the mine owner who causes injury to the surface not lying directly over his mine appears from the case of *Bonomi v. Backhouse*, which is cited also as an authority for showing that the right to bring an action for injury to surface caused by withdrawal of proper support accrues not when the coal is extracted but when the surface is injured. The facts in *Bonomi v. Backhouse* (27 L. J. Rep. Q. B. 387, 33 L. T. Rep. 333), were these: The plaintiff was the owner of certain surface, and of an ancient house and buildings upon it. The defendant had worked a certain mine and left proper supports; but he afterwards worked another mine, 280 yards from the plaintiff's property, in such a way that the roof of the mine and surface of the land fell in, and caused a "thrust," which extended through the intervening workings to

those under the plaintiff's premises, causing the surface to subside so as to damage the foundations and walls of his buildings. The working which caused the thrust was more than six years before the action was commenced, but the actual damage to the buildings did not take place till within six years from the time the action was brought. The Court of Exchequer Chamber decided that "no cause of action accrued for the mere excavation by the defendant in his own land so long as he caused no damage to the plaintiff, and that a cause of action did accrue when the actual damage first occurred."

In this case nothing turned upon the pressure exerted by the buildings themselves, but it was not disputed that the plaintiff was entitled to recover compensation for the damage to his house and buildings by the taking away of the lateral support to which his surface was entitled.

Another case in point is that of *Brown v. Robins* (28 L. J. Ex. 250). In that case the plaintiff's house was built more than twenty years before, upon land under which coal had been worked, according to the custom of the country, with ribs and pillars left as supports. The defendant knowing this, worked his coal mines under land adjacent, but not immediately adjoining, so as to cause the soil intervening to give way, and thus to cause the soil under the foundation of the plaintiff's house also to give way. It was held that the defendant was liable. Lord Chief Baron Pollock said: "If it were necessary (which it is not) to decide whether the plaintiff was entitled to support for the house, as a house, we should be disposed to



hold, especially as it is above twenty years old, that he was entitled to the support of the surrounding ground. But when the jury found that the injury was not occasioned by the weight of the building, the existence of the house on the land was immaterial. The plaintiff complains of injury to the land, the fall of the house being rather matter of damage. And if the defendant knew that the land there had been so weakened by undermining on the east side, that there was greater danger in working on the west side than there would otherwise have been, then he ought not to have dug there so as to throw the plaintiff's land down. And, having done so, he is responsible for the injury."

The term "adjacent lands" was first defined in a Court of Law in the judgment of the Master of the Rolls in *The Mayor of Birmingham v. Allen* (L. R. 6 Ch. D. 284; L. J. Rep. 37 N. S. 207); confirmed on appeal. In that case the Master of the Rolls held that when, by reason of the working out of the mines under lands lying between the lands of A and those of B, A cannot work the mines under his own lands without causing a subsidence of B's lands and buildings erected thereon; B cannot restrain A from working his mines up to his own boundary. In the course of his judgment the Master of the Rolls said: "Now, what is the right of the adjoining owner? As I said before, it is a right to the support of his land in its natural state. Support by whom? The judges have said support by his neighbour. What does that mean? Mr. Chitty (counsel for the plaintiff, A) wanted to extend his neighbour to all England, and said: 'I do not care who they are; all the landowners in England, however distant, are

my neighbours for this purpose, if their operations do in any remote degree injure my land.' But surely that cannot be the meaning of it. The neighbouring owner for this purpose must be the owner of that portion of land—it may be a wider or a narrower strip of land—the existence of which in its natural state is necessary for the support of my land."

When a building erected less than twenty years has been injured by the subsidence of the land upon which it is built, the question of liability depends upon whether the weight of the building has helped to cause the subsidence. If the workings would have caused the land, unencumbered, to subside, then the mine-owner is liable for the damage done to the building and land; but if, but for the weight of the building, the land would not have subsided in consequence of the workings, the mine-owner is not liable. This is the principle to be gathered from the cases of *Wyatt v. Hutchinson* (3 B. & Ad. 871), *Brown v. Robins* (4 H. & N. 186), *Hunt v. Peate* (Johns 705), and *Partridge v. Scott*, and has always been acted upon by judges in directing juries. "Judges often have—at least I myself often have," says Martin, B., in *Bonomi v. Backhouse*, "left it to the jury to say whether the building of the house has made any difference as to the subsiding of the land."

The right of buildings erected twenty years to actual support of the adjoining land was the subject of much discussion in the above-mentioned case of *Dalton v. Angers* (6 App. Ca. 740), in which, after calling in the assistance of six judges, the House of Lords decided "That a right to lateral support from adjoining land may be acquired by twenty years' uninterrupted enjoy-

ment for a building proved to have been newly built or altered so as to increase the lateral pressure at the beginning of that time; and it is so acquired if the enjoyment is peaceable, and without deception or concealment, and so open that it must be known that some support is being enjoyed by the building."

The facts in the case were as follows: Two dwelling houses adjoined, built independently, but each on the extremity of its owner's soil, and having lateral support from the soil on which the other rested. This having continued for much more than twenty years, one of the houses (the plaintiffs') was, in 1849, converted into a coach factory, the internal walls being removed, and girders inserted into a stack of brick-work in such a way as to throw much more lateral pressure upon the soil under the adjoining house. The conversion was made openly, and without deception or concealment.

More than twenty years after the conversion, the owners of the adjoining house employed a contractor to pull down their house and excavate, the contractor being bound to shore up adjoining buildings and make good all damages. The contractor employed a subcontractor upon similar terms. The house was pulled down, and the soil under it excavated to a depth of several feet; and the plaintiffs' stack, being deprived of the lateral support of the adjacent soil, sank and fell, bringing down with it most of the factory. It was held, upon the principles above stated, that the plaintiffs had acquired a right of support for their factory by the twenty years' enjoyment, and could sue the owners of the adjoining house and the contractor for injury.

With regard to the right of support to buildings

from subjacent soil where there has been twenty years' enjoyment of the support, there appears to have been up to recently only one case directly in point. That case was *Rogers v. Taylor* (2 H. & N. 828), in which case Lord Chief Justice Cockburn laid it down to the jury that at the end of twenty years after the house had been built, the plaintiff (the owner) would have acquired a right to support unless in the meantime something had been done to deprive him of it, and that the jury must presume that the additional burden was put upon the land by the assent of the owner of the minerals, and must presume a grant by such owner of a right to support. He therefore left it to the jury to say whether the plaintiff had enjoyed the support for the foundation of his house for twenty years. And the verdict, found for the plaintiff, was upheld by the Court. The decision in this case was never appealed against, and was therefore the law upon the subject of subjacent support to buildings erected twenty years. Probably the reason why there are not many cases upon the point is due to the fact that the excavations, which have caused the injury, would have caused the surface in its natural state to subside. In the case of *Bell v. Love* (10 Q. B. Div. 548), it was held by Lord Justice Lindley that the principles of *Dalton v. August* (cited above), applied also to that case, which was a case of subjacent support. That being so, a house built twenty years acquires a right to the support of the subjacent land upon the same conditions as it acquires a right to the support of adjoining land, which conditions are to be found in the decision of *Dalton v. August*, above cited.

In the cases previously considered in this chapter no question of title was involved. Where such a question arises the matter becomes one of construction of documents. Lord Blackburn thus put it in *Davis v. Treharne* (6 App. Ca. 467): "In common right the person who owns the surface has a right to have it supported below by minerals. What a Court of Law has to do is to look at the documents, and see whether the parties have agreed upon something different from the common right."

It is obvious that each particular case must depend upon the documents relating to it, and except where a principle of construction applicable to all such cases is laid down, the judgment in one case will afford but little aid in determining another. A case furnishing a useful principle of construction is that of *Smith v. Darby* (L. R. 7 Q. B. 716). In that case a plea to a declaration for mining under the plaintiff's land without leaving proper support, whereby the foundations of the plaintiff's mill and other buildings gave way, and the buildings fell, which set out a lease granted by the plaintiff's predecessor in title, the terms of which were sufficient to show, by implication, that it was intended that the lessees of the mine should have the right to work the mine so as to undermine the surface, subject only to paying damages according to the covenants, was held upon demurrer to be good. In the course of his judgment, Lush, J., said: "I take it to be well established by the cases, that a grant of all the minerals under certain lands without more, must be read not as meaning a grant of all the minerals that may be found under those lands, but of all the

minerals that can be taken away from under those lands without disturbing the surface. And if to that grant be superadded provisions for compensation for damage done to the surface, if the words giving compensation can be fairly satisfied by reference to acts done on the surface, though they may be large enough to extend to damage done to the surface by taking away the support, still they must be confined to acts done on the surface, the presumption being that the grantor did not intend to enable the grantee of the minerals to take away the support from the surface soil. Now if the words of this lease contained only phrases of that description capable of being satisfied by reference to acts done on the surface, I should agree that they did not confer power on the lessees to take away the minerals without leaving support under the surface-soil. But the words are not capable of being so read; you cannot satisfy the terms of the grant without imputing to the grantor an intention to enable the grantee to take away all the minerals he may find there, though the effect of the working may be to let down the surface land."

*Mundy v. Duke of Rutland* (23 Ch. D. p. 81) is a case which shows how strictly the Court will construe rights reserved in derogation of a grant.

The Duke of Rutland has an estate in Derbyshire, comprising about 900 acres, under which are valuable mines of coal. The seams necessary to be referred to as regards this case are six, lying thus: The Main or Deep Soft, 124 yards from the surface; the Deep Hard, 17 yards beneath that; the Piper, 15 yards deeper; the Furnace, 40 yards deeper; the Black

Shale, 78 yards deeper; and the Kilburn, 110 yards deeper. These measurements include the thickness of the various seams themselves. The Main Soft consists of a seam 4 feet 3 inches thick; the Deep Hard is 4 feet 6 inches thick, and below the Deep Hard there are nearly 20 feet, altogether, of coal in different strata, all of which are more or less workable. The coal in these seams dips from south to north, and from east to west, in the form of a saucer, the deepest point on the duke's land being where it joins settled estates of the plaintiff's.

In the beginning of the year 1866, the Main Soft and the Deep Hard seams had been largely worked on the duke's land, leaving only about 190 acres to the Deep, where it adjoins the plaintiff's land, ungoten. These workings, having been on the long-wall system, which leaves no pillars or workable coal, had partly closed and were filled with water, which rose in the pit to some 75 yards above the Deep Hard Mine; and the pressure of that water, which is estimated to be in extent some 200 acres, against the face of the coal unworked to the Deep, is stated to be about 100 pounds to the square inch.

In that state of things, the Duke of Rutland let to the trustees of the settlement of Mr. Mundy's property, of which Mr. Mundy (dead at the time of the action) was then tenant for life, the unworked portion of the Main Soft and Deep Hard seams, comprising about 196 acres, and adjoining the coal in the same seams in the Mundy property.

In the lease the Duke of Rutland reserved to himself and his lessees the right of working any coal not

expressly included in the lease, and the same powers and privileges with respect to such last-mentioned coal as if that lease had not been made ; provided always " that in exercising such powers and privileges the working of the coal then leased should not be prevented or unnecessarily interfered with, and that compensation should be made to the plaintiff for any necessary interference with the workings." The lessees covenanted to keep unworked certain barriers, which they did.

The Duke of Rutland afterwards leased some of the strata of coal underlying the coal leased to the plaintiff to the Manners Company, who sank to the Kilburn seam at an expense of £70,000, and commenced by working that seam to the rise, *i.e.* on the side farthest from the plaintiff's mines. Recently they began to drive a heading down towards one of the above-mentioned barriers, with the purpose of passing under it, and by a cross heading at the limit of their take under the plaintiff's mine, working back on the long-wall system, so as to get all the coal in the Kilburn seam under the mine demised to the plaintiffs and under the barrier. They pleaded their right to do this, and denied that the plaintiffs had any right of support. Plaintiffs applied for an injunction, alleging that if the defendants' workings were allowed to continue their colliery would be destroyed.

The Court of Appeal held that the proviso in the lease was unintelligible, and could not determine the rights of the parties ; that if a lessor wished to reserve rights in derogation of his grant, he must do so in plain terms ; and that on that ground the plaintiff was entitled to an injunction, if he could prove that



the works threatened by defendants would in all probability affect the security of his mine. Further evidence was directed on this point, and the Court ultimately granted the injunction.

With regard to the right to the support from the subjacent strata for the surface of common lands which have been inclosed by virtue of Acts of Parliament, it is probable that the 22 & 23 Vict. c. xliii. (previously referred to) will for the most part prevent disputes for the future, from the exercise of mining rights in such lands. But it may be convenient to refer to some cases decided upon disputed rights in lands inclosed prior to the passing of that Act. In the case of *Roberts v. Haines* (25 L. J. Q. B. 353), it appeared that an Inclosure Act had given power to allot the common and waste lands in a manor. It enacted that it should be lawful for the lord to come upon the common and waste, to search for and get coals, making compensation to any person whose allotment should be damaged. It was held that notwithstanding this power, the lord had no right so to work the coals as to destroy the support of the surface. Lord Campbell said, "Before the Inclosure Act, both surface and minerals belonged to the lord, but he agrees to that statute, and thereby to the alienation of the surface to the allottees, who are thus put in the same situation as if this had been part of the ancient enclosed land of the manor, and the lord had alienated it, in which case the alienee would have had all the rights of an owner of land at common law. That being so, according to *Humphries v. Brogden*, the owner of the surface is entitled to the support of the subjacent minerals, and

if the owner of the subjacent strata, working ever so carefully, according to the custom of the country, does injury to the surface, by making it subside, he is liable to an action. We have, therefore, to see whether any special power is given by this statute to the lord in this respect. According to one way of reading the Act, there would be a right for him to get the minerals anywhere and at any distance or depth, so that he makes compensation for damage done. But by consent of counsel on both sides, it seems agreed that the compensation is confined to damage done *on the surface*. This, therefore, leaves the lord in other respects in the position of an ordinary owner of minerals, where the surface belongs to another, and he cannot, therefore, defend himself effectually against an action."

But in the case of *Rowbotham v. Wilson* (25 L. J., Q. B. 362, and 8 H. L. Cases, 348), where an Inclosure Act had been passed, and on the face of the award it was stipulated that the allottees of the minerals should have liberty to work the mines, and the allottees of the surface should have no claim for compensation for any consequent sinking of the surface, it was held that the owner of the surface took it as a separate tenement, with only a *qualified* right of support from the minerals, and that he could have maintained no action against the allottee for working them in a careful manner. Houses had been erected upon the surface, and it was contended that as they had stood thereon for more than twenty years before the subsidence complained of, a right of support to them had at all events been acquired. But Lord Campbell

observed that “it would be strange if the owner of the minerals, who might work them although the surface in its natural state might be injured by subsidence, could be prevented doing so by the owner of the surface erecting upon it houses which he, the owner of the minerals, could in no way disturb. We are clearly of opinion that there is no evidence from which a lost grant from the owner of the minerals to the owner of the surface can be lawfully presumed, and that there is no evidence of enjoyment *as of right* from which the easement can be claimed under Lord Tenterden’s Act.”

It was laid down in the case of *Hilton v. Lord Granville* (13 L. J. Q. B. 193), that a custom or prescription by which a manorial right to work mines without compensation for injury is invalid. In *Bell v. Love* (*supra*), L. J. Baggallay, referring to this case, after stating that the dictum therein to the effect that a *grant* by deed to the like effect as the alleged custom would be unreasonable and bad, must be considered as overruled by the decision in *Rowbotham v. Wilson*, and *Buchanan v. Andrew* (L. R. 2 H. L. Ex. 286), observed that *Hilton v. Granville* was still good law as far as its decision related to the question of custom. “The reason,” he said, “why the custom should be held unreasonable and bad, whilst a grant to the like effect should be upheld, may well be that suggested by Blackburne, J., in *Blackett v. Bradley* (1 B. & S. 940), that though the parties may legally have made such a contract it would not be reasonable to presume that they had done so.”

The provisions of the Act 22 & 23 Vict. c. xliii.

will be found in another part of this work, and are very important to all persons interested in mineral property under inclosed lands.

Since the last edition was published the following important cases have been decided upon this branch of the law. Though the latest in point of chronological order, *Bell v. Love* (10 Q. B. Div. 54) is cited first, on account of a passage from the judgment of Lord Justice Baggallay, which clearly indicates the principles by which Courts of Law are guided in determining the rights of surface owners, and owners of minerals, when such rights depend upon the construction of inclosure acts or deeds. The passage is as follows :

“The respective rights of the owners of surface-lands and of the owners of minerals underlying such surface have of late years been the subject of much discussion, and it has been clearly established by a series of decisions, and particularly by the decision of the House of Lords in the cases of *Rowbotham v. Wilson* (1), *Duke of Buccleuch v. Wakefield* (2), and *Buchanan v. Andrew* (3), that although the *primâ facie* right of the owner of the surface is to have his surface supported, and the *primâ facie* right of the owner of the minerals to get them is limited to getting them in such a manner as not to occasion injury to the owner of the surface, such *primâ facie* rights may nevertheless be materially modified, to the extent even of authorising the owner of the minerals to disturb or let down the surface, by contract between the respective owners, or those through whom they claim ; and that it is immaterial whether such contract arises out of a covenant or reservation in a deed or out

of the provisions of an Act of Parliament giving legislative effect to arrangements come to, or presumed to have been come to, by the parties. In every case, however, in which the owner of the minerals claims any right in getting them in excess of, or other than, the *primâ facie* right of getting them without causing injury to the owner of the surface, the origin and nature and extent of such rights must be clearly defined by some grant or equivalent assurance; in the absence of which the presumption is in favour of the right of the owner of the surface to support."

An Inclosure Act which presumed throughout that the lord of the manor, at the time of the passing of the Act, had a right to work the mines under the waste without leaving sufficient support for the surface, and without making any compensation for injury so caused, provided that he, his successors or assigns, might hold all mines and quarries lying under the waste, together with liberty of searching for, winning and working the same as fully and freely as he or they might have had and enjoyed the same in case the Act had not been passed, and that without making or paying any satisfaction for so doing. The Act further provided that compensation for damage caused to any person's allotment by such working of the mines should be assessed by a justice of the peace, and should, when so assessed, be paid by the occupiers of the other allotments in the same township. In an action for working mines under the plaintiff's land without having sufficient support, it was held that the Act expressly gave to the lord of the manor and his assigns the right to let down the surface without

making compensation, and it was immaterial whether the right existed or not previous to the Act. *Gill v. Dickinson* (L. R. 5 Q. B. D. 159; 49 L. J. Q. B. D. 262; 42 L. T., n. s. 510; 28 W. R. 415). In this case the Court refused to follow the decision in *Beckett v. Bradley* (31 L. J., Q. B. 65).

A Local Inclosure Act, for inclosing certain commons, reserved to the lord of the manor, his successors and assigns, in the widest terms, all rights belonging to the manor, and all mines, minerals, and quarries under the commons, with power to do every act necessary for the draining, winning, and working such mines, minerals, and quarries as fully and freely as he or they could have had, held, used, or enjoyed the same in case the Act had not been made, without paying any damages or making any satisfaction for so doing. The assignees of the lord of the manor worked the mines so as to injure one of certain public highways set out by the commissioners, over the lands enclosed, in pursuance of the powers conferred upon them by the Act, which directed that they should be maintained by the inhabitants and occupiers of the township in which they were situated, and that it should be lawful for all persons to use the same. It was held, in an action by the local board—whose duty it was to repair the road—against the assignees to recover the expense of the repairs, that the reservation to the lord of the manor was to be taken to be subject to the public right created by the statute, and did not protect the defendants from liability. *The Benfieldside Local Board v. the Consett Iron Company, Limited* (L. R. 3 Ex. D. 54; 47 L. J. Ex. 491; 38 L. T., n. s. 530; 26 W. R. 114).

A very recent case was that of *Chapman v. Day* (47 L. T. Rep., n. s. 705), decided by Denman, J., and Pollock, B., under an Inclosure Act of 1777. There the surface was let down owing to sub-jacent and adjacent workings of the defendant, and some modern buildings thereon were injured. It was found by the special case that the subsidence was caused by the workings and not by the weight of the buildings themselves. It was also found that, apart from injury to the buildings erected by plaintiffs on the land, no appreciable damage resulted to the plaintiff or his property from the workings of the defendant, and the Court was asked on this ground to hold the defendant irresponsible in the action. "But," said Denman, J., "this is clearly not the result of such a finding; the injury to the land of the plaintiff was caused by a violation of the plaintiff's common law right of support, and the necessary effect of the wrong committed was to do damage to buildings lawfully erected on the land which was entitled to support, and forming part of the plaintiff's freehold. It would be impossible to hold that the plaintiff was entitled to nominal damages without holding that there was some relation between the parties to restrict the use of the land by the plaintiff, *so as to exclude any right of building on his own land.*"

The following is a summary of the law deducible from the cases cited in this chapter :

I. Where the relation between the owner of the surface and the owner of the mine is not regulated by any contract or Act of Parliament.

(1) The mine-owner is liable for injuries caused to

the surface unincumbered by buildings, whether the workings causing the injury are subjacent or adjacent.

(2) Where buildings have been erected, and the surface would have subsided if they had not been erected thereon, the mine-owner is liable for the injury caused to such surface and buildings by subjacent or adjacent workings, however recently they may have been erected.

(3) Where, but for the weight of such buildings, the subsidence would not have taken place, the mine-owner is not liable, except where the buildings have been erected for twenty years, for injury caused to the surface and buildings by subjacent workings, or workings under adjoining lands, where the enjoyment of the support of the houses has during the twenty years been peaceable and without deception or concealment, and so open that it must be known that some support is being enjoyed by them.

(4) The term "adjoining lands" in this chapter means that portion of land—it may be a wider or a narrower strip of land—the existence of which in its natural state is necessary for the support of the land, injured by such workings, in its natural state.

II. Where the relations between the owner of the surface and the owner of the minerals are governed by some contract, whether such contract arises out of a covenant or reservation in a deed, or out of the provisions of an Act of Parliament giving legislative effect to arrangements come to or presumed to have been come to by the parties, the *primâ facie* right of the owner of the surface is to have his surface supported, and the *primâ facie* right of the owner of



the minerals to get them is limited to getting them without causing injury to the surface; and when the latter claims any right in excess of this, the origin, nature, and extent of such rights must be clearly defined by some grant or equivalent assurance, in the absence of which the presumption is in favour of the right of the owner of the surface to support. In other words, what a Court of Law has to do is to look at the documents, or the Act of Parliament, to see whether the parties have agreed to something different to the common right.

III. While a contract or an Act of Parliament may give a mine-owner the right to work his minerals so as to pull down the surface, a custom claiming such a right is bad.

IV. When different seams lying perpendicularly over one another belong to different persons, the degree of support to which the upper is entitled from the lower has as yet by no means been distinctly defined. But when the owner of several seams of coal sells or lets some of the upper seams, he must by that grant confer on the purchaser or lessee a right to sufficient support from the underlying strata, to enable him to use the strata granted for the purpose for which he acquired them. *Mundy v. Duke of Rutland*, per. Kay. J. 23 Ch. Div. p. 81.

V. The right to bring an action for injuries caused by mineral workings commences not from the date of the working by which the injury was caused, but from the date of the injury itself.

## CHAPTER XIII.

### INUNDATIONS AND BARRIERS.

“THE law relating to this subject,” says Mr. Bainbridge, “seems to be sufficiently simple and rational. It is founded on the natural assumption that water is the common enemy, which, whether open or concealed, each owner must combat for himself; and upon another different but consistent principle, that each owner has the full right to extract the greatest possible benefit from his property; and that if in so doing he injure his neighbour he will not be liable to action, if his acts spring from no malice or mischief, and are simply consistent with a reasonable exercise of his own rights. For he ought not to be held responsible for the negligence of a neighbour who might have protected himself. The custom prevailing in most mining districts is conformable to this law. The mine-owner works to the very end of his boundary on the dip of the beds, and leaves a barrier of his own mineral on the rise. Each owner thus fares alike, and each is, or ought to be, independent of the other.”\* There is here no question of easement. It is a matter depending entirely upon

\* Bainbridge on Mines, 426.

the admitted rights of property. If an upper owner trespass upon the barrier of a lower owner, the former will be liable for the consequential damage, as well as for the trespass itself.

The leading cases upon this subject are the following. In the case of *Clegg v. Dearden* (17 L. J. Q. B. 233), the plaintiffs were in possession of a colliery in Staffordshire from 1830 to the commencement of the suit. The defendant had worked an adjoining colliery, on the rise, previously to the demise, had trespassed into the plaintiffs' coal mine, and had made some excavations and openings in the coal of that mine, by means of which the roof of those excavations fell in, and the interstice became filled with water. Afterwards the plaintiffs worked within a few yards of their boundary, where they found these waters which flooded their mine. These trespasses were previously unknown to the plaintiffs. The defendant had ceased to work his own coal, and to pump out the water. It was found by the special verdict that the distance left by the plaintiffs would have been a sufficient barrier, if the defendant had not trespassed wrongfully. In 1841 an action on the case was brought against the defendant for those trespasses, which was referred to an arbitrator, and substantial damages awarded. Afterwards another action was brought against the defendant for not closing the barrier. But it was held by the Court of Queen's Bench that the action could not be maintained. Lord Denman in giving judgment said there was a legal obligation to discontinue a trespass, or remove a nuisance, but no such obligation upon a

trespasser to replace what he had pulled down or destroyed on the land of another, though he was liable in an action of trespass to make compensation in damages for the loss sustained. The defendant having made an excavation and aperture in the plaintiffs' land, was liable to an action of trespass; but no cause of action arose from his omitting to re-enter the plaintiffs' land to fill up the excavation. Such an omission was neither a continuation of a trespass, nor of a nuisance, nor the breach of any legal duty. The flowing of the water and the damage were merely consequential, for which compensation had been made.

The case of *Smith and others v. Keurick* (18 L. J. C. P. 172) is also a valuable leading case upon this subject. The plaintiffs and defendant occupied adjoining collieries. In 1844 a predecessor of the defendant, but with whom he had no privity, committed a trespass and made three holes, called thyrlings, in and through a barrier of coal belonging to the plaintiffs, which separated the two collieries, and formed a barrier between the chambers which had been excavated in the defendant's colliery and the chambers in that of the plaintiffs. The defendant afterwards became the occupier of his colliery without any privity either of contract or estate between him and his predecessors who had so made these holes. When the defendant became the occupier there was a large subterraneous body of water in the Avon Eitha (that is, the defendant's colliery), which communicated with and was fed by springs in the neighbourhood. This body

of water was on a higher level than the chambers of Avon Eitha, and separated from them by a horizontal bar of coal which was part of Avon Eitha Colliery. The chambers of Avon Eitha were on a higher level than the holes above mentioned, and the holes were on a higher level than the chambers of Plas Bennion (that is, the plaintiffs' colliery). The effect of removing the horizontal bar of coal in Avon Eitha would be that the water above mentioned would of itself flow into the chambers of Avon Eitha, and that a large portion of such water would also flow on itself from the chambers of Avon Eitha, through holes or thyrlings, into the chambers of Plas Bennion.

The defendant, during his occupation before the month of June, 1845, knowing that these holes were then open into Plas Bennion, and that the effect of removing the horizontal bar of coal would be as above stated, nevertheless did remove it in order to get the coal and work his mine in the manner most advantageous to himself. In consequence of the removal the water flowed of itself into the chambers of Avon Eitha. One portion of the water flowed on of itself, thence through the thyrlings or holes into the chambers of Plas Bennion. Another portion of it would have flowed down to the bottom of Avon Eitha and below the holes, had it not been obstructed in its natural course by a dam which the defendant had placed in Avon Eitha, and it was thus turned into the chambers of Plas Bennion. This dam was removed by workmen of the Plas Bennion Colliery before the commencement of the action. The defendant con-

tended that the action was not maintainable, as the defendant, in getting the coal from his own mine, as stated, had not done any act from which it was his duty to refrain. The plaintiffs contended that it was the duty of the defendant to refrain from cutting through the bar of coal in his own mine, under all the circumstances of the case. Other points were also made on each side; but they do not affect the general principle which governs the rights of adjoining owners of coal strata. The judgment of the Court of Common Pleas was delivered on the 14th of February, 1849, by Mr. Justice Cresswell. He said: "The claim of the plaintiff to compensation is advanced on two grounds: first, on a supposed duty on the defendant, arising out of the act of Evan Jones (his predecessor in the occupation) in removing the plaintiff's barrier of coal when he occupied Avon Eitha, and the subsequent occupation of the same colliery by the defendant; and, secondly, on a general liability, said to be imposed by law upon the defendant, to be responsible for the injury done to an adjoining colliery by water casually introduced into his own in the course of working it. As to the first point, it is to be observed that there was no privity of any kind between Evan Jones and the defendant. The act done by Jones, of which complaint is made, was done not upon the premises now occupied by the defendant, but upon those of the plaintiff; nor does the defendant derive his title to the premises he occupies from Jones. There was no privity of estate or contract between Jones and the defendant. . . . If Jones had done anything in Avon Eitha Colliery

which made his premises in their then state a *nuisance* to the plaintiff's colliery, the defendant, as occupier, might have been made responsible for continuing them in that state, as for upholding the nuisance. The act done by Jones to the injury of the plaintiff's mine was on the plaintiff's soil, where the defendant would have no right to go, even if he wished it, for the purpose of remedying the evil that Jones had done. We think, therefore, that no special duty to protect the plaintiff's mine against water in the defendant's mine attached to the latter, in consequence of Jones having removed the plaintiff's barrier of coal when he occupied Avon Eitha, and of his (the defendant's) having succeeded him in such occupation.

"The next ground upon which it was contended that the defendant was liable in this action is much broader, namely, that he was of common right bound to prevent the water coming into his own mine from flowing into his neighbour's. It is material to remember that in the case it is stated that the defendant worked out the coal which protected his own mine from the subterranean body of water, for the purpose of obtaining the coal, and so working his mine in the manner most beneficial to himself. There is nothing from which we can infer that it was an unusual or negligent mode of proceeding, or that it was done with any design to injure his neighbour's mine." He then proceeded to examine several cases which had been quoted in the argument, and to distinguish them from the present. He referred to the case of *Haward v. Bankes* (2 Burr. 1113), observing upon it that "there can be no doubt that a man *may*

*cause* water to flow from his own premises into his neighbour's, so as to make himself liable to an action—for instance, by erecting a mound or other work to give it that direction, as appears to have been done by the present defendant before a former action was commenced, and in which he paid money into Court as compensation. In this case it ought not to be said that he *caused*, but that he *permitted*, the water to flow into the plaintiff's mine. . . . Treating the question as a new one, not governed by any decided case, it would seem to be the natural right of each of the owners of two adjoining collieries, neither being subject to any servitude to the other, to work his own in the manner most convenient and beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine, so long as that does not arise from the negligent or malicious conduct of the party. In the present case it could not be disputed that, but for the excavation of the plaintiff's coal, the defendant would have been entitled to work out the whole of his own coal; for if the space which it had occupied became afterwards filled with water, that would have done no harm to the plaintiff, if his coal also had not been excavated; and if he afterwards excavated his own, and the water flowed in from the defendant's workings, he would not on that account have any right of action for the damage done by it. . . . Here the working of the two mines has been simultaneous. But the defendant's mine not being subject to any servitude, what authority is there for saying that the plaintiff, by working his coal, could



alter or abridge the right of the defendant to work his own? Surely the reasonable thing is that the plaintiff should leave part of his own coal to protect his own workings against the influx of water. The plaintiff took that view of the matter, and left a barrier which would have been sufficient for the purpose, but was broken through by a wrongdoer, for whose act the defendant is not responsible. There are many cases in which the principle has been recognised that one landowner cannot, by altering the condition of his land, deprive the owner of the adjoining land of the privilege of using his own as he might have done before. Thus he cannot, by building a house near the margin of his land, prevent his neighbour from excavating his own land, although it may endanger the house, unless, indeed, by lapse of time the adjoining land has become subject to a right analogous to what in the Roman law was called a servitude. So also in *Acton v. Blundell* (13 L. J. Ex. 289) the Court held that one landowner having dug a well in his own land, could not maintain an action against a party who afterwards sunk a coal-pit in the neighbourhood, which had the effect of drawing the water away from his well; the act not being done by the defendant maliciously or negligently, but in a proper manner for the purpose of winning his own coal. We think the same principle is applicable to the present case. The water is a sort of common enemy, against which each man must defend himself. And this is in accordance with the civil law, by which it was considered that *land on a lower level owed a natural servitude to that on a higher*, in respect of

receiving, without claim to compensation, the water naturally flowing down to it. . . . Upon the whole we are of opinion that the plaintiff is not entitled to recover."

Since the first edition was published, the following case has occurred, which supplies further illustrations of the principle above stated. It is that of Baird and others *v.* Williamson (33 L. J. C. P. 101), where it was held that the owner of the upper of two adjoining collieries is not liable for injury done by water flowing by gravitation into the lower mine from works conducted by him in the usual and proper manner for the purpose of getting minerals from any part of his mine. But he must not interfere with such gravitation so as to make it more injurious to the lower mine, for if he does so and be thereby an active agent in sending water to the lower mine, an action will lie against him by the owner of the lower mine for the injury it may occasion. The Court endorsed the judgment in *Smith v. Kenrick*, and the principle affirmed and developed is this, that the plaintiff as occupier of the lower mine *is subject to no servitude of receiving water conducted by man* from the higher mine, which would not have got there naturally. Each mine-owner has all the rights of property in his mine, and amongst them the right to get all minerals, provided he works with skill in the usual manner, and if, while the occupier of the higher mine exercises that right, nature causes water to flow to a lower mine, he is not responsible for that operation of nature. If the owner of the lower mine intends to guard against this operation, he must leave a barrier at the upper part

of his mine to bank back the water of his higher neighbour. This judgment was given upon demurrers raising the legal points, and was not the result of a trial by jury.

The case of Rylands and Fletcher was decided in the House of Lords in 1868 (L. R. 3 H. L. App. 330, 19 L. T. R. 221). Fletcher was the lessee of certain coal mines. Rylands and another were the owners of a mill, standing on land adjoining that under which the mines were worked. They constructed a reservoir. Fletcher had worked his coal up to a spot where there were some old passages of disused mines. These passages were connected with vertical shafts communicating with the land above, which shafts had also been disused and were apparently filled up with marl and earth. No care was taken by the engineer to block up these shafts, and soon after water had been let into the new reservoir, it broke through some of the shafts, flowed through the old passages and flooded Fletcher's colliery. Lord Cairns said, after stating that it must be taken from the case that the contractor for the reservoir did not exercise that reasonable caution he might have done, said: "The principles on which this case must be determined are extremely simple. The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used. And if, in what I may term the natural uses of that land, there had been any accumulation of water, either on the surface or underground, and if by the operation of the laws of nature, that accumula-

tion had passed off into the close occupied by the plaintiff, the plaintiff could not have complained. If he had desired to guard himself against it, it would have lain upon him to do so by leaving or interposing some barrier between his close and the defendant's, in order to prevent that operation of the laws of nature. On the other hand, if the defendants, not stopping at the natural use of their close, had desired to use it for what I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon, for the purpose of introducing water either above or below ground in *quantities*, and in a manner not the result of any work or operation of nature on or under the land, and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril. And if in the course of their doing it the evil arose of the escape of water, and its passing away to the close of the plaintiff and injuring the plaintiff, then for the consequence of that, in my opinion, the defendants would be liable. As *Smith v. Kenrick* is an illustration of the first principle to which I have referred, so is *Baird v. Williamson* of the second principle."

Since the decision last quoted, the case of *Nichols v. Marsland* (L. R. 10 Ex. 255) has been decided, and its decision is very important as furnishing an exception to the general liability as laid down therein. On Marsland's (the defendant's) land, were artificial pools,

containing large quantities of water. These pools had been formed by damming up, with artificial embankments, a natural stream which rose above his land and flowed through it, and which was allowed to escape from the pools successively by weirs into its original course. An extraordinary rainfall caused the stream and the water in the pools to swell so that the artificial embankments were carried away by the pressure, and the water in the pools being thus suddenly loosed, rushed down the course of the stream and injured the plaintiff's adjoining property. The plaintiff, having brought an action against the defendant for damages, the jury found that there was no negligence in the construction or maintenance of the works, that the rainfall was most excessive, and amounted to *vis major*. The Court decided that the action was not maintainable, upon the principle that one who places water on his own land, and uses all reasonable care to keep it safely there, is not liable to an action for the escape of the water which injures his neighbour, if the escape be caused by any agent beyond his control, such as a storm which amounts to *vis major*, or the act of God, in the sense that it is practically, though not physically, impossible to resist it.

The case of *Fletcher v. Smith* (2 App. Ca. 781) is also a leading case on injuries to mines by water. The mine of the defendants adjoined and communicated with that of the plaintiffs, and on the surface of the defendant's land were hollows and openings, partly caused by, and also partly made, to facilitate the defendant's workings. Across this surface ran a watercourse, or brook, which *had been diverted* by the

defendants for their own convenience. In 1871 this brook burst its banks, owing to extraordinary rains, though it was deep enough for average rains. The water escaped, and accumulated in the hollows, and from thence by fissures and cracks passed into defendant's, and thence into plaintiff's mine. If the land had been in its natural condition, the water would have spread over the surface and been harmless. The defendant was not guilty of negligence in the management of his mine. But it was held, on the principle of *Fletcher v. Rylands*, that the defendants were liable, though not guilty of personal negligence, and though the accumulation arose from exceptional causes. Where for his own convenience, as here, a party does something, *e.g. diverts a watercourse*, he must take care that the new course shall be sufficient to prevent mischief from an overflow. The defendant, in fact, *brought the water to the place*, from which it escaped, for his own purposes. One of the judges said: "If the similitude of a dangerous animal is looked for in this case, it will be found that the defendants did not keep, but they *created* one for their own purposes, and let it loose. It is as though they bred a savage animal, and turned it into the world."

No doubt it is difficult to reconcile these two decisions. The circumstances of the cases were very much alike. But the main principle which seems to lie at the root of the leading decisions is this, that a kind of "servitude," or liability, attaches by the general law of nature and property to that land which lies on a lower level in its relation to that which is higher, to receive any water which comes or is let down

upon it, provided it flows in the course which natural laws direct. If the occupier of the higher ground by any artificial means alters the course of the current he sends down, the servitude of the lower land will not compel the occupier to receive such a diverted flow. But, on the other hand, if the flow from the higher to the lower level be natural, the occupier below must take measures to protect himself against the liabilities of his natural situation, and prevent the discharge of water upon himself, which, if it found an outlet to him, would not generally, however injurious, create a right of action, or be the ground of an injunction. The principles recognised by our English law are clear, and the only difficulty is in their application to the innumerable variety of circumstances which occur in practice.

Since the last edition was printed, several important cases have been decided in the Court of Appeal, with respect to discharge of water into a neighbouring mine. The case of the *West Cumberland Iron and Steel Company v. Kenyon* (11 Ch. Div. 782) may be considered to be a leading case on this subject. The judgment of Mr. Justice Fry (6 Ch. Div. 773) was reversed on appeal by Lords Justices James, Brett, and Cotton. The plaintiffs and the defendant were proprietors of adjoining collieries. The action was brought to restrain the defendant from permitting water to flow through a certain "bore-hole" in their mine directly or indirectly into the plaintiffs' workings, and also for damages. The plaintiffs' colliery was to the dip of the defendant's. The latter sunk a shaft by which they tapped water. That same water had formerly found its way into some old workings of

their own, and had from them percolated into the plaintiffs' mines. The defendants not only sunk the shaft and tapped the water, but they then made a bore-hole at the bottom of the shaft. It was admitted that the bore-hole was made not in the due course of mining, but *only for the* purpose of getting rid of the water in the shaft. The effect of this operation was to let off the water into the old workings and hollows in the defendant's own ground, from which it percolated into the plaintiffs' works in the same way it would have done if neither shaft nor bore-hole had been made. Such being the facts, Mr. Justice Fry decided in favour of the plaintiffs, upon the ground that the defendants, by making the shaft, *appropriated the water*, and made themselves masters of it, and so became bound to prevent it flowing into the plaintiffs' works.

The Court of Appeal reversed this decision. In giving judgment Lord Justice James said: "The evidence shows that the water which was tapped by the new shaft, and afterwards discharged through the bore-hole in the defendant's old workings, was water which, following the stratification of the country, had previously found its way into the same subterraneous hollows from which water was pumped up by the pumps which at one time were used at the Limefitt Shaft (defendant's old shaft), and that the same water substantially found its way down into those hollows to the same extent as it found its way afterwards through the shaft (*i.e.* the new shaft) and the bore-hole. Several witnesses were called—experts, who said they had no doubt that every particle of water would have gone



down, and must have been going down into the Limefitt Shaft when the pumps were going on, that being the course by which these water-bearing strata discharged their water so as to prevent it rising up above the sixteen fathoms, down to which distance the stratification was quite dry. It seems to me, upon the evidence, that there were these water-bearing strata draining down into the hollows that had been formed by the old workings of the principal vein of the Limefitt property, and thence into the lowest level, and that the defendants made a shaft which did to a certain extent tap that water, but only diverted into that shaft for a time the water which, previous to that diversion, was finding its way down into the lowest level. . . . The working of the defendant's shaft and bore-hole has not been shown to have thrown any *additional* water on the plaintiffs'. The way in which the case is presented to us by the defendants is this: We do not treat it as a mining question . . . we deal with it as if it were something on the surface. We have made certain things on our land, and have done that without doing you any mischief. That is to say we have done something on our land that we had a right to do. We had occasion, or we were minded, to sink a shaft in our own land, and finding that it was getting filled with water, *we made a drain from the bottom* to prevent the water accumulating which would have destroyed it. But we drained the water into our own land, into some old hollows which were there . . . and from which the water, no doubt, found its way into the plaintiffs' land. But it found its way exactly in the same course, so far as the plaintiffs are con-

cerned, as before it left our hollow, in exactly the same place, the same way and to exactly the same extent as it would have done if we had not done anything of the kind. . . . *I have always understood that everybody has a right on his own land to do anything with regard to the diversion of water, or the storage of water, or the usage of water, in any way he chooses, provided that when he ceases dealing with it on his own land, when he has made such use of it as he is minded to make, he is not to allow or cause that water to go upon his neighbour's land, so as to affect that neighbour's land in some other way than the way in which it had been affected before."*

Where it is proved that a mine cannot be worked without causing the destruction of the mine itself, and irreparable injury to an adjoining mine, an injunction will be granted to restrain such working at the suit of the owner of the adjoining mine. *Crompton v. Lea* (L. R. 19 Eq. 115).

## CHAPTER XIV.

### WORKING OUT OF BOUNDS.

THE working of coal beyond the limits to which the proprietor of the mine is entitled is sometimes a source of great mischief. It is not only the loss of the coal itself which may be involved, but the barrier left by the neighbouring miners may be broken through, and thus bring about calamitous results to life and property. The remedy for this injury is an action of trespass. This wrongful act is one of not unfrequent occurrence, and so many cases have at different times come before the Courts relating to the wrongful working of coal, that the law is now well settled as to the principles upon which the damages for the trespass should be assessed. "There was a technical rule in the English Courts in these matters," says Lord Blackburn, in *Livingstone v. Rawyards* (5 App. 39). "When something that was part of the realty is severed from the realty and converted into a chattel, then instantly on its becoming a chattel, it becomes the property of the person who had been the owner of the fee in the land whilst it remained a portion of the land; and then in estimating the damages against a person who had

carried away that chattel, it was considered and decided that the owners of the fee were to be paid the value of the chattel at the time when it was converted. . . . Baron Parke, in *Wood v. Morewood* (3 Q. B. 440) put this qualification upon it, as far as I am aware, for the first time. He said: "If however the wrong-doer has taken it perfectly innocently and ignorantly, without any negligence and so forth, and if the jury in estimating the damages are convinced of that, then you should not consider its value when it had been turned into a piece of coal after it had been severed from the rock, but you should treat it at what would have been a fair price if the wrong-doer had bought it whilst it was yet a portion of the land as you would buy a coal-field."

In taking accounts in actions for trespass to coal in the Court of Chancery two rules have been followed, sometimes an allowance for the cost of severance on getting the coal has been made, and sometimes it has not. In all cases an allowance has been made for the cost of bringing the coal to bank. By force of the Judicature Acts these rules now prevail in the Common Law Courts. These two rules, the milder and the harsher, have been applied in numerous cases.

The *milder rule* was applied in *Wood v. Morewood* above cited, the jury believing that the defendant had acted fairly and honestly. It has been applied where the defendant has acted under a *bonâ fide* belief of title; e.g. *Hilton v. Woods* (L. R. 4, Eq. 432, 16 L. T. R. 736).

In that case the defendant was anxious to work coals under lands adjacent to his colliery. He could not

find the owner, and took a conveyance of part from the owner of the surface, and under this worked the coal. At the time the plaintiff himself was not aware that he was the owner, and only discovered it after the coals had been worked. In this action the plaintiff sought to have the harsher rule applied in the assessment of damages, but Vice-Chancellor Malins held that this being a case of trespass under a *bonâ fide* belief of title the milder rule ought to be applied, and the defendant was accordingly allowed the cost of severance and getting to bank. Upon similar grounds the Courts decided in *Jegon v. Vivian* (L. R. 6, Ch. App. 742), *Asleton v. Stock* (L. R. 6 Ch. Div. 719), and *Trotter v. Maclean* (13 Ch. Div. 574, 42 L. T. R. 118).

In *Hilton v. Woods*, Vice-Chancellor Malins also said it would apply where the defendant had acted inadvertently, and similar language was used by Lord Hatherley in *Livingstone v. Rawyards* (5 App. Ca. 34). It was applied in *re United Merthyr Collieries Company* (L. R. 15, Eq. 46), which was a case of mere mistake.

The *harsher rule* has been applied where the Courts have found fraud, as in *Ecclesiastical Commissioners, &c., v. N.-E. Railway Co.* (4 Ch. Div. 845). It would be applied where there has been negligence, as laid down in *Wood v. Morewood*. It has been applied where the act of the defendant has been wilful, as in *Martin v. Porter* (5 M. & W. 351); also where the Court has said that the defendant has acted in a manner wholly unauthorised and unlawful, which was the language of Vice-Chancellor Bacon in *Llynir Company v. Brogden* (L. R. 4 Eq. 188). The way in

which the discretion of the judge should be exercised is thus stated by Lord Hatherley in *Jegon v. Vivian* (cited above). He said: "I think that the milder rule of law is certainly that which ought to guide this Court, subject to any case of a special character which would induce the Court to swerve from it." The whole of the decisions upon these rules are ably discussed by Judge Fry in *Trotter v. Maclean* (13 Ch. Div. 586).

It is not altogether clear what is meant by "inadvertence" as used by the judges, having regard to the fact that "inadvertence" is defined in the dictionaries to mean amongst other things "negligence," and "negligence," as has been stated, brings the trespasser within the harsher rule. By the light of Lord Blackburn's language at p. 39 of his judgment in *Livingstone v. Rawyards* (5 App.), the inadvertence would seem to amount to being ignorant with as little negligence as possible.

From the cases the following rules seem deducible in cases of trespass and working into a neighbour's coal:

I. Where the trespasser has acted under a *bonâ fide* belief of title, or fairly and honestly, under mere mistake or through inadvertence as defined above, he will be allowed the expense of getting or severing the coals and conveying them to bank.

II. Where the trespasser has been guilty of fraud or negligence, or has acted in a manner wholly unauthorised and unlawful, he will only be allowed the expense of getting the coal to bank, but not that of getting or severing.

The above rules only apply to cases where the damage done is simply the taking away of the coal. But when in consequence of the taking away of the coal the neighbouring mine is flooded or rendered more expensive to work, the defendant is liable, in addition to the damages assessed under the rules, to such consequential damages as can be shown to have been caused by his wrongful act.

If the adjoining owner sinks a mine in his own land, and makes lateral excavations, trespassing upon the minerals of a lessee to whom that land has been demised generally, and in which the minerals are not yet worked, without disturbing the surface of the land, the lessee may maintain an action for the trespass to his possessory interest, and the lessor may maintain an action for the injury to his reversionary estate. If the surface and minerals have been severed in title, and become separate tenements, then the grantee or owner of the minerals is the only person entitled to sue in respect of trespasses upon them.\*

In order to avoid this kind of trespass, and the expense and responsibility it involves, proper underground surveys ought to be made by competent surveyors, which serve to prevent such trespasses as are not wilful and intentional.

There is no difficulty in ascertaining by such surveys the precise position of the workings to a yard. Surveys and maps ought to be kept in the office of the colliery. And when this mode of self-protection is not attended to, the trespasser, even by accident, cannot justly complain if he is made to pay, by way of damages, the

\* *Keyse v. Powell*, 22 Law Journ. Q. B. 305.

value of the coal at the pit's mouth, without being allowed to deduct the wages he may have paid for cutting it, and certain other expenses connected with raising it to the surface.

In the case of *Davies v. Sheppard* (35 L. J. Ch. 531), the view of the Court of Chancery with respect to a mistake in quantity, and the expression "or thereabouts," may be found.

The mines under a farm of 181 acres were supposed to be divided by a fault running north and south in such a way as to leave about 83 acres on the west and 98 acres on the east; and the owners, by several agreements, agreed to demise to S. the mines lying to the westward of the fault, "supposed to be 83 acres or thereabouts," and to D. the mines lying to the east of the same fault, "supposed to be 98 acres or thereabouts," and each lessee was to pay, in addition to a royalty, a dead rent amounting to about £2 per acre on the estimated area of the mines demised to him. No lease was executed to either of the lessees, but they entered upon and commenced working the mines agreed to be demised to them respectively. S. in the course of his working arrived at a fault, which if taken as the boundary between the mines agreed to be demised to him and those agreed to be demised to D., would leave him only eight acres instead of 83, and he worked through the fault. D. then filed a bill for an injunction to restrain him from so working, and one of the Vice-Chancellors granted the injunction; but upon appeal this decision was reversed, the Court being of opinion that, assuming the fault worked through by the defendant to be the same as the fault indicated



in the agreement (which was not clear), the plaintiff was not entitled to a lease of mines so largely exceeding the estimated acreage of the mines agreed to be demised to him as the mines lying to the eastward of the fault, and he could not be considered as constructively in possession of more than the lessors had by their agreement bound themselves to demise.

In construing the words "or thereabouts," when used to qualify the statement of the estimated quantity of mines agreed to be demised, the same principles ought to be acted upon as would guide the Court in construing the same words in an agreement for sale or demise of the surface.

In the case of *R. v. Hickman and others*, tried at Stafford, in March, 1861, before Mr. Baron Wilde, an attempt was made to give a criminal character to acts of this nature. The prosecutor was the occupier of a colliery, and the prisoners were in partnership, and occupied an adjoining colliery. This last had been partially worked out by other previous occupiers, but in 1857 the prisoners took a lease of it, and continued the works by taking out the ribs and pillars. In February, 1860, the prosecutor, in consequence of suspicions, applied to the prisoners for leave to inspect their workings, which was refused. In July the prisoners, on being applied to by the prosecutor's solicitor, gave permission. It was then discovered that a brick wall had been made across a gate-road near the boundary of the two mines, in consequence, as the prisoners said, of the fire-damp, which made it impossible to work further in that direction. The prisoners refused to remove this dam. A mining

engineer deposed that in 1859 he had informed the prisoners that they had carried the gate-road a little beyond their boundary, through the prosecutor's mine. Another witness, who had been in their employ early in 1860, proved that not only had this gate-road been carried about 100 yards through the prosecutor's mine, but that he had been told by the prisoners to get the coal on both sides of it. It was thick coal, and was about twenty yards in thickness, and this witness said that it had been taken by order of the prisoners, who superintended the under-ground work, to the extent sometimes of fifteen yards in width. It was after this that the dam was constructed, and the suggestion was made that the dam was for the purpose of concealing what had been done. The prosecutor admitted that he himself had formerly been compelled to make compensation for coal which he said had been taken by his servants from an adjoining owner without his knowledge. Mr. Baron Wilde told the jury that they must be satisfied that the prisoners did not take the coal by mistake before they convicted them. The question whether it had been taken by mistake or wilfully, and with the felonious intent, would depend partly upon the extent to which the coal had been taken, and the circumstances under which it had been taken. The jury were to consider whether there was any good reason for putting up the dam, or for not taking it down ; in which latter case, if no coal had been taken, it might have been clearly shown. He then referred to the evidence of the surveyors, and finally left it to the jury to say whether they were

satisfied with the evidence of the witness who proved the working by order of the prisoners. The jury retired, and afterwards found a verdict that the prisoners had taken the prosecutor's coal, but did not do it wilfully.

The above report is from the assize intelligence in the *Times*; but their reports are remarkably accurate, and it is therefore inserted here to show that working out of bounds may sometimes be the subject of criminal as well as civil proceedings. The evidence must, however, be extremely strong and clear to justify proceedings of this nature.

The Statute of Limitations may be pleaded to actions of trespass for injuries of this kind. If the acts complained of took place more than six years before the commencement of the suit it will fail if the limitation is set up as a defence. Even fraud will not prevent the operation of the statute. But while this statute greatly curtails the remedy in the Common Law Courts, those of Equity will hold that in cases of fraud the time begins to run from the discovery of the mischief, or from the time when, with due diligence, the discovery might have been made.\* If, therefore, an action is brought in a Court of Equity for an account of minerals wrongfully taken, the statute cannot be successfully pleaded if the injury has been first discovered within six years from the filing of the bill. It is in general very difficult to obtain evidence of intentional fraud. But when coal has been taken by working out of bounds, there must be either fraud or

\* *Dennis v. Shuckburgh*, 4 Young & C. 42.

mistake. And a Court of Equity will give the same relief by decreeing an account in cases of mistake as well as of fraud.\*

Where a mine-owner has reasonable ground for belief that an adjoining mine-owner is trespassing, he can obtain, upon an affidavit of the grounds of his belief, an interlocutory order for inspection under order 30, rule 3, of the Judicature Acts, upon such terms as to costs as to the judge seems fit. *Mitchell v. Darley Main Colliery Company* (10 Q. B. Div. 457).

In the case of *Trotter v. Maclean* (13 Ch. Div. 576, 42 L. T. R. 118), the operation of the Statute of Limitations was considered with reference to wrongful workings. In that a mine-owner worked into an adjoining mine in the honest belief that he was about to obtain a contract from the trustees in whom it was vested, and he gave one of them notice that he was about to commence. They, however, had no power to contract with him. The Court held that the working was to be deemed inadvertent; and, in taking the account on that supposition, defendant was allowed the cost of severing and raising them. But from the time he received notice that no contract could be made authorising him to work, his working was treated as fraudulent, and he was only allowed the cost of bringing these to bank. It was held also that so long as a wrongful working is to be treated as *inadvertent* the Statute of Limitations applies, and the account will only be directed for six years from the issue of the writ. But *the onus is on the defendant* to show that minerals got by him were got before six years.

\* *Brooksbank v. Smith*, 2 Young & C. 58.

## CHAPTER XV.

### COALS LYING UNDER RAILWAYS AND CANALS.

IN the case of a railway passing through a mineral district, it would have greatly added to the expenses of the undertaking if the company had been obliged to purchase the subjacent minerals, which they did not want, as well as the surface, which they did want. A provision, convenient and useful to all parties concerned, was introduced by the Legislature into the Railway Clauses Consolidation Act, 8 Vict. c. 20, by which the property in the subjacent minerals is severed from that of the surface in the case of lands purchased for the purposes of a railway. The clauses which refer to such conveyances, and to the notice required to be given before working such minerals, and to the power reserved to railway companies of purchasing them, and the rights of the owner after notice, are as follows :

*Sect. 77.*—The company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the

works, unless the same shall have been expressly purchased ; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby.

*Sect. 78.*—If the owner, lessee, or occupier of any mines or minerals lying under the railway, or any of the works connected therewith, or within the prescribed distance, or, where no distance shall be prescribed, forty yards therefrom, be desirous of working the same, such owner, lessee, or occupier shall give to the company notice in writing of his intention so to do thirty days before the commencement of working ; and upon the receipt of such notice it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for the purpose ; and if it appear to the company that the working of such mines or minerals is likely to damage the works of the railway, and if the company be willing to make compensation for such mines or any part thereof to such owner, lessee, or occupier thereof, then he shall not work or get the same ; and if the company, and such owner, lessee, or occupier, do not agree as to the amount of such compensation, the same shall be settled as in other cases of disputed compensation.

*Sect. 79.*—If, before the expiration of such thirty days, the company do not state their willingness to treat with such owner, lessee, or occupier for the payment of such compensation, it shall be lawful for him to work the said mines or any part thereof for which the company shall not have agreed to pay compensation, so that the same be done in a manner proper

and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district where the same shall be situate, and if any damage or obstruction be occasioned to the railway or works by improper working of such mines, the same shall be forthwith repaired or removed, as the case may require, and such damage made good by the owner, lessee, or occupier of such mines or minerals, and at his own expense ; and if such repair or removal be not forthwith done, or if the company shall so think fit, without waiting for the same to be done by such owner, lessee, or occupier, it shall be lawful for the company to execute the same, and recover from such owner, lessee, or occupier the expense occasioned thereby, by action in any of the superior Courts.

*Sect. 80.*—If the working of any such mines under the railway or works, or within the above-mentioned distance therefrom, be prevented as aforesaid by reason of apprehended injury to the railway, it shall be lawful for the respective owners, lessees, and occupiers of such mines, and whose mines shall extend so as to lie on both sides of the railway, to cut and make such and so many airways, headways, gateways, or water-levels through the mines, measures, or strata, the working whereof shall be so prevented, as may be requisite to enable them to ventilate, drain, and work their said mines, but no such airway, headway, gateway, or water-level shall be of greater dimensions or section than the prescribed dimensions and sections, and, where no dimensions shall be prescribed, not greater than eight feet wide and eight feet high ; nor shall the same be cut or made upon any part of the

railway or works, or so as to injure the same, or to impede the passage thereon.

*Sect. 81.*—The company shall pay to the owner, lessee, or occupier of mines extending so as to lie on both sides of the railway such additional expenses and losses as shall be incurred by such owner, lessee, or occupier, by reason of the severance of the lands lying over such railway, or of the continuous working of such mines being interrupted, or by reason of the same being worked in such manner and under such restrictions as not to prejudice or injure the railway, and for any minerals not purchased by the company which cannot be obtained by reason of making and maintaining the railway. If any dispute or question arise touching the amount of such losses or expenses, the same shall be settled by arbitration.\* *Whitehouse v. Wolverhampton and Walsall Railway Company* (L. R. 5 Ex. 6).

\* In *Whitehouse v. Wolverhampton and Walsall Railway Company* (L. R. 5 Ex. 6), it was held that an arbitrator appointed to assess under this section the losses or expenses sustained and incurred by a mine-owner, by reason of his land being severed and the working of his mines being interrupted, rightly included in his award items of compensation for additional losses or expenses not then actually sustained or incurred, but which would necessarily be sustained or incurred in working the mines, and which were capable of being immediately estimated with reasonable certainty.

In *ex parte Neath and Brecon Railway Company* (2 Ch. Div. 201), it was held that compensation under sects. 78 and 81 is not within the condition of the bond to be given under sect. 85 of the Land Clauses Act, 1845, by a railway company desirous of entering upon lands before agreement, award, or verdict.



*Sect. 82.*—If any loss or damage be sustained by the owner or occupier of the lands lying over any such mines the working whereof shall have been so prevented as aforesaid, by reason of the making of any such airway or other work as aforesaid, which would not have been necessary to be made but for the working of such mines having been so prevented as aforesaid, the company shall make full compensation to such owner or occupier of such surface lands for the loss or damage so sustained.

*Sect. 83.*—The company may, after giving twenty-four hours' notice in writing, enter upon any lands through or near which the railway passes wherein any such mines are being worked, or are supposed to be, and into any such mines or the works connected therewith, and may make use of any apparatus or machinery belonging to the owner, lessee, or occupier of such mines, for the better ascertaining whether any such mines are being worked or have been worked so as to damage the railway or works.

*Sect. 84.*—Any owner, lessee, or occupier of any such mine refusing to allow any person appointed by the company so to enter into and inspect such mines or works to forfeit to the company a sum not exceeding £20.

*Sect. 85.*—If any such mines have been worked contrary to the provisions of this or the special Act, the company may give notice to the owner, lessee, or occupier thereof to construct such works and adopt such means as may be necessary for making safe the railway and preventing injury thereto; and if such owner, lessee, or occupier do not forthwith after such notice proceed to construct such works, the company

may themselves construct them, and recover the expense by action in any of the superior Courts.

On the subject of the relations that may be created by the 78th and 79th sects. of the Railway Clauses Consolidation Act, as between a railway company and the owner of minerals underlying the railway, a question was lately mooted as to the sufficiency and effect of a notice given pursuant to the 78th sect. by the owner of the minerals to the company, and as to the right of support for the surface to which the vendors of land sold for the purpose of a railway would be entitled. It appears that the general common-law right of support for the surface which they might otherwise have possessed is qualified by the power of working mines expressly reserved to the mine-owner. And this, under the terms of sect. 79, is a power to do whatever is proper and necessary for beneficial working, limited only by the obligation to work in the manner usual in the district. The two sections 78 and 79 were considered in the late case of the Great Western Railway Company *v.* Fletcher (of which a summary will be given), and it was held that when taken in connection with each other, their effect was to free the mine-owner, in the event of the company declining to compensate him, from liability in respect of damage done by works conducted in the usual manner. There was a series of prior decisions relating to canals to the same effect upon statutes similarly worded, namely, Wyrley Canal Company *v.* Bradley (7 East, 368), and Dudley Canal Company *v.* Grazebrook (1 B. & Ad. 59), and the Caledonian Canal Company *v.* Sprot (2 Macqueen's Rep. 449).

With respect to the general question of notice under sect. 78, it is obvious that the terms of that section are vague and general. Differences of opinion may easily arise as to the circumstances under which such a notice would be authorised, and as to the extent of area to be comprised in it. The difficulty will turn chiefly upon the effect to be given to the words "desirous of working the same."

On the one hand it may be said that the difficulty of ascertaining whether a mine-owner was really desirous of working the minerals at the time of giving the notice, shows that the notice itself must be taken as conclusive evidence of a desire within the meaning of the Act. It would probably be held that the notice contemplated by the 78th sect. is only authorised when there is a *bonâ fide intention*, as well as an actual ability, to work, within a reasonable time, some part of the minerals lying within the prescribed distance from the railway. It is, no doubt, a difficult matter to ascertain the reality of the desire or intention to work, but nevertheless it would seem to be a point which may properly be raised and entertained. As to what is a *reasonable time*, the Act seems to contemplate a readiness to work on the expiration of the thirty days, and although it may not be necessary to begin so soon, yet inability to do so, after the lapse of any lengthened period without working, would probably be considered as evidence from which the absence of a *bonâ fide* desire at the time of the notice might be presumed. With regard to the extent of the area to be comprised, the notice may be taken to extend both horizontally and vertically to all minerals expressly

mentioned in it, which may be won or got by means of the same general system of workings by which the prescribed limit of forty yards is intended to be reached. It would seem that upon a notice being thus given, the railway company would be bound, once for all, to specify with reasonable certainty the particular part of the minerals for which they are willing to make compensation. It is questionable whether they are entitled to postpone their decision until the workings are further developed, or to require a fresh notice with every change in the workings, or when any fresh measure is entered upon, provided they are all part of one general system of workings.

In the case of *Fletcher v. Great Western Railway Company* (28 L. J. Ex. 147), the railway company had purchased land for the purpose of their railway, by agreement, and having taken a conveyance in the form given in the Land Clauses Act, 8 & 9 Vict. c. xviii. schedule A., were not willing to purchase the minerals after notice of the owner's intention to work them, pursuant to sect. 78 of the Railway Clauses Act, 8 & 9 Vict. c. xx. It was held that the company under those circumstances were not entitled to the adjacent or subjacent support of the minerals, but that the owner is entitled to get them, although the getting such minerals should cause the surface to subside. Therefore, when the company had given notice that the working of the mines was likely to damage the works of the company, the owner of the minerals was held entitled to recover compensation, which had been assessed under sect. 78 of the 8 & 9 Vict. c. xviii. The Chief Baron said: "The construction of the

clauses in the Act is clear, that unless the mines and minerals are expressly purchased, they shall be deemed to be excepted out of the conveyance. They were *not* so purchased. The conveyance is in the form given by the Act, consequently the company have taken the land as if the mines and the minerals were excepted. They belong, therefore, not to the company, who are owners of the surface, but to the owners of the *land*. The 78th sect. enacts that the mines near the railway shall not be worked, if the company are willing to purchase them. In that respect it puts all the world on the same footing, whether they are grantors or strangers. But if the company are unwilling to purchase, then the owners may work them, which means, that if the company desire to exclude the owners from working the mines, they can, by taking the proper course, do so. If they do not, then they may go on working the mines without doing unnecessary damage."

This judgment has since been affirmed in the Court of Exchequer Chamber. Lord Chief Justice Cockburn said that the 77th and 78th clauses of the Railway Clauses Consolidation Act must be read together, and expressed himself in substance to the same effect as the Lord Chief Baron in the Court below.

In the case of the Great Western Railway Company *v.* Bennett, in the House of Lords (L. R. 1867, App. S. p. 27), it was held that by the effect of the 77th, 78th, and 79th clauses a railway company, on purchasing land for the railway, do not become entitled to the mines under the land; the owner may work them after notice duly given; and if, after such notice, the company, though desiring to prevent the

working, do not give compensation for the minerals, the owner may work them up to and under the railway, working them in a "proper manner," and according to the usual manner of working such mines in the district. The company cannot under this statutory purchase claim the benefit of the right of an ordinary purchaser of the surface to subjacent and adjacent support, the statute having created a specific law for such matters, by which alone the rights of the mine-owner and the company are regulated. The Lord Chancellor said that the writ of error in this case was virtually brought upon the decision of the Court of Exchequer Chamber in Fletcher's case, as the present one was decided upon the authority of the former without argument.

In the recent case of *Smith v. G. W. Railway Co.* (3 Ch.D. 535, 3 App. Ca. 165), which went to the House of Lords, the following important points were decided: In claims for compensation for not working mines adjoining a railway and railway works, the 6th and 78th sects. of the Railway Clauses Act, 1845, must be read together. The 6th sect. gives a general right to compensation to "owners and occupiers of, and all other parties interested in, lands taken or injuriously affected by the construction" of the railway. In the 78th sect. the person entitled to give notice to the directors of a railway company of his intention, within thirty days to work a mine, is the "owner, lessee, or occupier," who has the right and the power to work it. The directors are entitled to have an inspection of the mine and to offer compensation to him for not working, which compensation may be settled as therein mentioned. The compensation thus settled is

that to which he is individually entitled, according to the extent of his interest. If the lessee is the person thus giving notice and receiving compensation, the owner, if he can show a right of his own beyond that of his lessee who has been compensated, is also entitled to compensation under the 6th sect. The words "he" and "his" in two of the parts of the 78th sect. refer to the person entitled to compensation, whether owner, lessee, or occupier. The word "lands" in the 6th section includes mines; and that section in regard to the compensation therein provided is to be read with reference to the Land Clauses Act. After compensation is agreed on and obtained or tendered a perpetual injunction may be granted against the working of the mines. Where a lessor claims as for forfeiture for breach of covenant to re-enter on mines demised, but a compromise is effected and the lease surrendered, the lessor will be recognised as a reversioner, and his subsequent sale of the fee *held* to convey to his vendor all the rights of an original owner.

It will be perceived that when the owner proceeds to work the minerals after the railway company have declined the option of purchase, the latter are not entitled to claim the usual common-law right to the support of the surface they occupy. But this is an exceptional case, and the rule seems to be grounded entirely upon the neglect on the part of the company of the equitable provisions of the statute. The opposite doctrine was upheld in the case of the Caledonian Railway Company *v.* Sprot, in the House of Lords (2 Macqucen, 449), where land had been conveyed to a railway company in Scotland for the purpose of the

railway, prior to the Railway Clauses Consolidation Act. It was decided that such a conveyance gives a right by implication to all reasonable subjacent and adjacent support connected with the subject matter of the conveyance, and that, therefore, although in the conveyance the minerals are reserved, the grantor is not entitled to work them, even under his own land, in any manner calculated to endanger the railway. On the same principle, "if the owner of a house were to convey the upper story to a purchaser, reserving all below the upper story, such purchaser would on general principles have a right to prevent the owner of the lower stories from interfering with the walls and beams upon which the upper story rests, so as to prevent them from affording proper support."

The distinction between this case and that of the previous one is this, that here the conveyance was not a conveyance under the statute, but an ordinary private assurance. "There is an obvious distinction," said Lord Chief Justice Cockburn, "between an ordinary purchaser and one who acquires the surface by a *compulsory* purchase, under the Land Clauses Consolidation Act, 1845," and upon this distinction the diversity of the decisions depends. Similar provisions have been inserted in various Acts of Parliament, incorporating canal companies, and enabling them to purchase lands for the formation of a canal. The effect of them is to deprive the company of the right to support for the railway or canal from coal, ironstone, slate, or minerals beneath the surface of the adjoining land, or beneath the land over which the railway or canal is carried, unless they have purchased the slate



or minerals, or compensation has been given in the manner prescribed by the statute.

Under statutory provisions of this sort, the company do not in the first instance pay to the landowner more than the value of the surface in the shape of purchase money, or for the injury to the surface, if only compensation is made for damage. The minerals remain the property of the owner of the soil. But where he is desirous of getting them, the company have the option of purchasing at a fair price, to be settled in case of dispute in the usual way. These provisions are for the benefit of the company, who are relieved from the great expense of buying the minerals along the whole line of an intended railway or canal in the first instance, before it is constructed, and are enabled to postpone the purchase of them until the time when, from the state of the market in the neighbourhood, the owners really want to get them. When this happens, the company have an option either to buy (in which case the landowner cannot get the minerals, but is fully compensated for the loss of that right), or not to buy, in which case he receives no compensation at all, and his right to get them remains as complete as if no railway had been made. The Act only deals with minerals under the specified limits. With regard to minerals lying beyond those limits, the company have no power under the Act to purchase them, nor are they bound to make compensation for not working any portion of them. The company's right of lateral support is the same as that of any other surface owner, as far as these minerals go. Consequently it is advisable, in agreements with

railway companies, to make provision for compensation, in case these minerals cannot be worked through fear of causing damage to the railway. (See Davidson P. Conv. vol. ii. part 1.)

In *Midland Railway Company v. Checkley* (L. R. 4 Eq. 19), Lord Romilly held that the cases decided upon this point only go to establish the company's right to an injunction, but not to absolve them from making compensation for the minerals without the specified limits, as well as those within them.

In the case of canal companies, it has been held that clauses in Acts of Parliament requiring coal-owners to give notice to the company of their intention to work their mines within a certain distance of the canal, and giving liberty to the company to inspect the works, and to prohibit the owners, upon compensation being made, from working within that distance, were framed for the purpose of enabling the company to purchase out the rights of the coal-owners, if they thought their canal works likely to be endangered by the nearer approach of the miners; that if the company declined the purchase, the coal-owners were left to their common-law rights, as if no canal had been made; and they might take every part of their coal in the same manner as they might have done before the Act passed; their former rights in that respect not having been taken away by the Act, which has only appropriated the surface of the land, and so much of the soil as was necessary for the cutting and making of the canal, leaving the coal, &c., to the owners, to be enjoyed in the same manner as before.\*

\* *Wyrley Canal Co. v. Bradley*, 7 East, 371; Addison on Torts, 34.

## CHAPTER XVI.

### ACCIDENTS IN COLLIERIES—LIABILITIES OF EMPLOYERS.

IT is only necessary to read a few of the reports of the inspectors of mines to appreciate the importance of this subject. From these reports it appears that the large proportion of accidents and deaths in mines occur to individuals whose own carelessness is the sole cause of their own injuries. Upon this class of accidents there is nothing further to say; but there are a large number of accidents which are alleged to happen in consequence of the negligence, or ignorance, or rashness of the employer, or his agents or overmen, or of the fellow-workmen of the sufferers. Other accidents there are whereby strangers suffer through the negligence of persons in the employ of the colliery owner. The object of this chapter is to state the legal rules which fix and define the responsibility for such accidents.

As the last-named class of accidents requires the shortest consideration, we will take it first. It was long ago settled that, by the law of England, a master of a servant is liable to a stranger for damage caused by the act of the servant while employed on the master's business. If, however, the master employs a fit and proper person to execute work for him under a contract,

and a stranger is injured through the negligence of the contractor or his workmen, the master will not be liable for such injury. But a man who orders work to be executed on his own premises, lawful in itself, but from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else to do what is necessary to prevent the act he had ordered to be done from becoming wrongful (*Bower v. Peate*, 1 Q. B. Div. 321). So too where the work which the contractor is employed to execute is a part of a duty imposed by statute upon the person or corporation employing the contractor, this exemption from liability does not apply, and the stranger has his remedy against such person or corporation. See *Hole v. Sittingbourne Railway Company* (30 L. J. Ex. 81).

But the master is not liable, unless the act which caused the injury to the stranger was within the scope of the servant's authority, or incident to the ordinary duties of his employment. Illustrative of this may be cited the case of *Stevens v. Woodward*, decided in 1881 by the Queen's Bench Division, and reported in 6 Q. B. Div. 318. In that case the plaintiffs occupied premises beneath the offices of the defendants, who were solicitors. One of the defendants had a room of the offices, and in it was a lavatory for his own use exclusively, and his orders to his clerks were, that no clerk should come into his room after he had left. A clerk went into the room to wash his hands

after his employer had left, turned the water-tap, and negligently left it so that water flowed from it into the plaintiffs' premises and damaged them. Upon the principle above stated, the Court held that the defendant was not liable. In the course of his judgment, the following observations fell from Mr. Justice Grove: "Although a definition is difficult, I should say that the act for which the master is to be held liable must be something incident to the employment for which the servant is hired, and which it is his duty to perform. All the cases tend to show, and *Mitchell v. Crassweller* (13 C. B. 237) and *Storey v. Ashton* (L. R. 4 Q. B. 476) point out clearly, that line of distinction. In one case a servant was employed to drive his master's cart, and after coming home to the stable, started off on a fresh journey for his own purposes, and during that second journey, which was not incident in any way to his employment, an accident happened. In the other case, which goes a little further, before the servant put up the cart he turned off and went in another direction, making a *détour*, and an accident happened. In both cases the master was held not liable. I think I should have come to the same conclusion as that I have arrived at, if there had been no express prohibition in the case, and it had merely been shown that the clerks had a lavatory where they could wash their hands. Then what possible part of the clerk's employment could it be for him to go into his master's room, to use his master's lavatory, and not only the water but probably his soap and towels, solely for his (the clerk's) own purposes? What is there in any way incident to his employment as a clerk? I see nothing. The case seems to me just the same as if

he had gone up two or three flights of stairs and washed his hands in his master's bedroom. It is a voluntary trespass on the portion of the house private to his master. I do not use the word 'trespass' in the sense of anything seriously wrong, but he had no business there at all. In doing that which his employment did not in any way authorise him to do, he negligently left his stop-cock open, and the water escaped and did damage. I think there was nothing in this within the scope of his authority, or incident to the ordinary duties of his employment."

The next branch of employers' liabilities to be considered is that which relates to the doctrine of common employment; that is, to the liability of the employer for injury to his workmen where the injury is caused by some other person in the same employment. The law hereupon has been the subject of numerous decisions. For a long time the workmen and their representatives kept up a constant agitation for an amendment of the law, which they alleged was unfair to them, as it tended to make masters careless of their safety. The result of this agitation was the Employers' Liabilities Act, 1880, which came into operation on the 1st day of January, 1881. By it large and important changes were made in the law as it previously existed, and in view of its importance it is given in full in this chapter, with notes of [such cases as have been decided since it was passed and brief observations on the changes effected in the law. As, however, it is not in itself a complete code of the law of employer and workman, it is still necessary to consider the law as it stood before the passing of the Act. The first case upon the subject was that of

*Priestly v. Fowler* (3 M. & W. 1), where it was decided that a master is not liable for injury caused to his servant by the negligence of a fellow-servant. This rule was extended to the case of volunteers, that is to say, persons assisting in doing the work of the employer's servants at the request of the latter, but without the request or knowledge of the employer. Where volunteers are injured by the negligence of the employer's servant in such cases, no liability attaches to the employer. See *Degg v. Midland Railway Company* (26 L. J. Ex. 171).

The rule in *Priestly v. Fowler* was subject to two qualifications: (1) Where the injury was caused by the personal interference or negligence of the master. (2) Where the master neglected to furnish proper machines, or selected incompetent servants, and injury ensued to a workman in consequence. In such cases the workman could recover (*Wilson v. Merry*, L. R. 1 Sc. App. 326). But where the master furnished instruments or machines which were dangerous, and the servant knew they were dangerous, and the danger was so normal that it was in the ordinary course of the employment, the servant could not recover. And that though it was the master's duty to furnish proper machinery and materials, he was not liable by the mere fact of his using machinery which was not as safe as might be used (*Dynen v. Leach*, 26 L. J. Ex. 221).

It was also laid down that the rule which exempts the master from liability to a servant for injury caused by the negligence of a fellow-servant applied to cases where, though the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, yet the risk of injury

from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepted, that it must be included in the risks which have to be considered in his wages (*Morgan v. Vale of Neath Railway*, L. R. 1 Q. B. 149).

It was a good defence to an action against the master for negligence, that the workman had materially contributed to the injury by his own rashness (*Clark v. Holmes*, 30 L. J. Ex. 13).

Such is a brief sketch of the law as it stood before the passing of the recent Act.

It will be convenient here before we set out the Employers' Liability Act to make a few observations on the term negligence. It has been defined differently by different writers and judges. In the case of *Smith v. L. & S. W. Ry. Co.* (p. 102) the present Master of the Rolls, then Mr. Justice Brett, said: "I take the rule of law in these cases to be that which is laid down by Alderson, B., in *Blyth v. Birmingham Waterworks Company* (25 L. J. Ex. 213): 'Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.'"

One of the most important cases on the law of negligence is the recent case of *Heaven v. Pender* (10 Q. B. Div. 503). In that case the defendant, a dock-owner, supplied and put up a staging outside a ship in his dock under a contract with the ship-owner. The plaintiff was a workman in the employ of a ship-painter who had contracted with the ship-owner to paint the outside of the ship, and in order to do the



painting the plaintiff went on and used the staging, when one of the ropes by which it was slung, being unfit for use when supplied by the defendant, broke, and by reason thereof plaintiff fell into the dock and was injured. The Court of Appeal held that the plaintiff was entitled to recover, and the Master of the Rolls in his judgment stated as follows :

“Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property. . . .

“Whenever one person is by circumstances placed in such a position with regard to another, that everyone of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to these circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger. . . .”

The Employers' Liability Act, 1880 (43 & 44 Vict. c. xlii.), provides as follows :

*Sect. I.*—Amendment of the law.

I. Where, after the commencement of this Act, personal injury is caused to a workman

(1) By reason of any defect in the condition of the ways, works, machinery, or plant, connected with or used in the business of the employer ; or,

(2) By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence ; or,

(3) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed ; or,

(4) By reason of the act or omission of any person in the service of the employer, done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf ; or,

(5) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal points, locomotive engine or train upon a railway ;

The workman, or, in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in the case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work.

Sect. II., Exceptions to amendments of law, provides as follows :

A workman shall not be entitled, under this Act, to any right of compensation or remedy against the employer in any of the following cases, that is to say :

(1) Under sub-section 1 of sect. I., unless the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of some person in the service of the employer and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.

(2) Under sub-section 4 of sect. I., unless the injury resulted from some impropriety or defect in the rules, by-laws, or instructions therein mentioned; provided that where a rule or by-law has been approved, or has been accepted as a proper rule or by-law by one of Her Majesty's Principal Secretaries of State, or by the Board of Trade, or any other department of the Government, under or by virtue of any Act of Parliament, it shall not be deemed for the purposes of this Act an improper or defective rule or by-law.

(3) In any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence.

*Notes to Sects. I. and II.*—These sections should be read together. It will be observed that the Act alters the law as laid down in *Priestly v. Fowler*, where the person causing the injury is a person exercising superintendence, or has the charge or control of any signal points, locomotive engine, or train upon a railway. It takes away from the master the right to set up the defence of knowledge on the part of the workman in cases of defective machines, when the workman has worked on with full knowledge of the defects, provided he has given notice of them where he does not know that the master or a superior already knew of them.

The wording of sub-section 1 of sect. I. left it not

altogether free from doubt whether it was intended that the workman should recover in such cases as *Dynen v. Leach* (26 L. J. Ex. 221); the phrase, “defect in the condition,” appearing to be capable of being construed as not applicable to a machine perfect in condition but defective in principle of construction. Two recent cases have, however, been decided which remove any difficulty about the meaning of the phrase. The first was *Heske v. Samuelson & Co.* (12 Q. B. Div. 30). There the deceased, a workman in the employ of the defendants, was killed by a piece of coke falling from a lift used at a blast furnace belonging to them. The lift consisted of two platforms which ascended and descended alternately, and at the time when the deceased was injured he was removing empty barrows from the platform which was at rest at the bottom of the lift. There was evidence that the accident arose either from the sides of the lift not being fenced so as to prevent coke from falling over, or from the sides of the lift not being roofed so as to protect those working on it from falling coke. The Court held that under the circumstances there was a “defect in the condition” of the lift, for which the defendants were liable. Lord Coleridge said: “The question is, whether the fact that the machine was unfit for the purpose for which it was applied constitutes a ‘defect in its condition’ within the Act? The question really almost answers itself. If it was not in a proper condition for the purpose for which it was applied, there was a ‘defect in its condition’ within the meaning of the Act.” And Stephen, J., said: “The condition of the machine must be a condition with relation to the purpose for which it is applied.”

The second case is that of *Mitchell v. Holdsworth* (*Law Times*, December 8th, 1883). The deceased was employed in working at a machine, a part of which played backwards and forwards, and was placed in a position so near a wall that the passages by which it could be passed were only eleven or twelve inches wide, and in going to borrow a key he wanted to work the machinery, he had to pass the machine, and he did so at a spot where the space between it and the wall was only eleven inches, so that even if he compressed himself to the utmost he could scarcely clear the machine; and, in fact, he did not do so, and being caught by it was in a moment drawn in and forced into a small space and instantly crushed to death. It appeared that there were two other passages at which he might possibly have passed, but which, however, it was said were about as dangerous, one allowing only twelve inches between the wall and the machinery, and the other allowing no more than the one in question. The machine was in its ordinary state, and it appeared that a man had been killed some time ago at the same machine. The workmen knew all about it, and it was said that the defendant (the owner) also knew the position of the machine. A County Court jury found for the plaintiff (the widow of the deceased), and the Divisional Court upheld that finding. Lord Coleridge put the decision on the ground that it was an action founded on negligence; that there was evidence of negligence, and that the jury had negatived contributory negligence on the part of the man himself. Before the Act the master would not have been liable, but the Act said that the workman should have the same right of action against the employer for his negligence that one

of the public would have had, neither more nor less, as if he had not been servant to the defendant. Mr. Justice Stephen concurring, said as to contributory negligence: "The negligence of the workman which disentitles him to a remedy must be something more than that slight inattention to a known danger which persons ordinarily show who are well accustomed to the danger; it must be something more than that, how much more it was impossible to define; and the precise language used was of no consequence, nor could the jury have been misled by it."

In *Griffiths v. The Earl of Dudley* (9 Q. B. D. 357), it was held that it is competent to a workman to contract with his employer and not claim compensation for personal injuries under the Act, and that such a contract was not against public policy, and that the workman's widow suing for damages under Lord Campbell's Act was bound by it.

The effect of this case is to settle that an employer may contract himself out of the liabilities of the Act if he thinks fit. The Editors have been informed that this has been and is being done to a large extent by colliery owners, in most cases by causing the workmen to sign a written contract on entering their employ. (See ch. ix. p. 151, *Contract Book*.)

*Note to Sect. I., Sub-section 2.*—The case of *Shaffers v. The General Steam Navigation Company* (10 Q. B. D. 356), turned upon the construction of sub-section 2 as defined by sect. VIII. The plaintiff and one J. were employed with others by the defendants in loading sacks of corn into the hold of a ship. J.'s duty was to guide the beam of the crane by means of a guy

rope, and to give directions when to lower and hold the chain. He neglected to use the guy rope, and the sacks in consequence fell down the hatchway, and hurt the plaintiff who was working in the hold. It was held upon these facts that J. was "engaged in manual labour," and was not "a person having superintendence entrusted to him" within the meaning of sub-section 2 as defined by sect. VIII.

Manisty, J., in his judgment says: "Assuming that he (J.) superintended the working of the crane, was he exercising such a superintendence as is contemplated by the Act? I am clearly of opinion that he was not a person whose sole or principal duty was that of superintendence, and that the accident was not caused by his negligence while in exercise of such superintendence."

Three cases have been decided by the Queen's Bench Division upon sub-section 5.

In *Cox v. The Great Western Railway Company* (9 Q. B. D. 106), the following were the facts upon which the Court decided: The plaintiff was engaged as a capstan boy on the defendant's railway; while the plaintiff was engaged in turning a truck on a turntable to bring it on to a line of rails on which there were already a series of twelve trucks, to attach it to them, H., a capstan man, having control of a capstan a hundred yards off on the line of rails, without warning set the capstan in motion, thereby propelling the twelve trucks so that the plaintiff was caught between the buffer of the last of the twelve and the buffer of the truck he was turning, and injured. It was held that H. was a person who had the charge

or control of “a train upon a railway,” under sub-section 5, and the plaintiff was injured through his negligence and therefore entitled to recover.

In *Doughty v. Firbank* (10 Q. B. D. 358), it was held that the meaning of the term “railway,” as used in the 5th sub-section, is not confined to railways belonging to railway companies, such as are subject to the provisions of the Railway Regulation Acts; but the sub-section applies also to a temporary railway, laid down by a contractor for the purposes of the construction of works.

In *Gibbs v. The Great Western Railway Company* (11 Q. B. D. 22), the evidence showed that it was the duty of one Fisher, a workman employed in the signal department of defendant’s railway, to clean, oil, and adjust the points and wires of the locking apparatus at various places along a portion of the line, and to do slight repairs; that for these purposes he was, with several other men, subject to the orders of an inspector in the same department, who was responsible for the points and locking gear, which were moved and worked by men in the signal boxes, being kept in proper condition; and that Fisher having taken the cover off some points and locking gear in order to oil them, negligently left it projecting over the metals of the line, whereby injury was caused to the plaintiff. It was held upon these facts that there was no evidence that Fisher had “charge or control” of the points within the meaning of sub-section 5, so as to make the defendant liable for his negligence. This decision has since been affirmed on appeal (1884, W. N., Jan. 26).

The effect of the last two cases is to show that under



the Act a railway means any line of rails used for the purpose of conveying traffic upon wheels, and a train a series of trucks with or without an engine. The last case and that of *Shaffers v. The General Steam Navigation Company* illustrate the meaning to be attached to the words, "a person having superintendence entrusted to him," and a person having "charge or control"—two expressions which will have constantly to be interpreted in a large crop of cases.

*Sect. III.*—Limit of sum recoverable as compensation.

"The amount of compensation recoverable under this Act shall not exceed such sum as may be found equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade employed during those years in the like employment and in the district in which the workman is employed at the time of the injury."

Inasmuch as wages paid to colliers in nearly all coal districts are governed by a sliding scale, no difficulty will arise in arriving at the maximum here defined.

*Sect. IV.*—Limit of time for recovery of compensation.

"An action for the recovery, under this Act, of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or in case of death within twelve months from the time of death: Provided always that in case of death the want of such notice shall be no bar to the maintenance of such action if the judge shall be of opinion that there was reasonable excuse for such want of notice."

The cases relating to notice under this section and sect. VII. will more conveniently be treated under the latter section.

*Sect. V.*—Money payable under penalty to be deducted from compensation under the Act.

“There shall be deducted from any compensation awarded to any workman, or representatives of a workman, or persons claiming by, under, or through a workman, in respect of any cause of action arising under this Act, any penalty or part of a penalty which may have been paid in pursuance of any other Act of Parliament to such workman, representatives, or persons in respect of the same cause of action; and when an action has been brought under this Act by any workman, or the representatives of any workman, or any persons claiming by, under, or through such workman, for compensation in respect of any cause of action arising under this Act, and payment has not previously been made of any penalty or part of a penalty under any other Act of Parliament in respect of the same cause of action, such workman, representatives, or person shall not be entitled thereafter to receive any penalty under any other Act of Parliament in respect of the same cause of action.”

*Sect. VI.*—Trial of actions.

“(1) Every action for the recovery of compensation under this Act shall be brought in a County Court, but may, upon the application of the plaintiff or defendant, be removed into a superior Court, in like manner and upon the same conditions as an action commenced in a County Court may by law be removed.

“(2) Upon the trial of any such action in a County Court before a judge without a jury, one or more assessors may be appointed for the purpose of ascertaining the amount of compensation.

“(3) For the purpose of regulating the conditions and mode of appointment and remuneration of such assessors, and all matters of procedure relating to their duties, and also for the purpose of consolidating any actions under this Act in a County Court, and otherwise preventing multiplicity of such actions, rules and regulations may be made, varied, and repealed from time to time, in the same manner as rules and regulations for regulating the practice and procedure in other actions in County Courts.

“‘County Court’ shall, with respect to Scotland, mean the ‘Sheriff’s Court,’ and shall, with respect to Ireland, mean the ‘Civil Bill Court.’

“In Scotland any action under this Act may be removed to the Court of Session at the instance of either party in the manner provided by, and subject to, the conditions prescribed by sect. 9 of the Sheriff’s Courts (Scotland) Act, 1877.

“In Scotland the Sheriff may conjoin actions arising out of the same occurrence or cause of action, though at the instance.”

*Sect. VII.—Mode of serving notice of injury.*

“Notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or if there is more than one employer, upon one of such employers.

“The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served.

“The notice may also be served by post by a registered letter addressed to the person on whom it is to be served at his last known place of residence or place of business; and if served by post, shall be deemed to have been served at the time when a letter containing the same would be delivered in the ordinary course of post; and in proving service of such notice it shall be sufficient to prove that the notice was properly addressed and registered.

“Where the employer is a body of persons corporate or unincorporate, the notice shall be served by delivering the same at, or by sending it by post in a registered letter addressed to the office, or if there be more than one office, any one of the offices of such body.

“A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading.”

*Cases under Sections IV. and VII.*—In *Moyle v. Jenkins* (8 Q. B. D. 116), plaintiff, while in the employ of defendant, was injured by an explosion of dynamite shattering his arm. The defendant came at once and saw the plaintiff, who told him of the accident. Plaintiff went into a hospital, and fifteen days after the accident a letter written by the matron of the hospital was sent to the defendant, saying: “I beg to inform you that

it was found necessary to amputate the right arm of Alfred Moyle to-day, and he is getting on as well as can be expected." The Court held that by sect. VII. a written notice was necessary; that the verbal notice given by plaintiff to defendant was not sufficient, and that the above letter was not such a notice as was contemplated by sect. VII.

The next case, *Keen v. The Millwall Dock Company* (8 Q. B. D. 482), went to the Court of Appeal. The facts were these. The plaintiff, on the day he had been injured, made a verbal report of such injury to his employer's inspector, who took down the details in writing and sent them to the employer's superintendent, and afterwards the workman's solicitor wrote to the employer as follows: "I am instructed by George Keen, of 136, Rhodeswell Road, Limehouse, to apply to you for compensation for injuries received at your dock, *particulars of which have already been communicated to your superintendent.*" It was held that this letter did not refer to any other writing, and was not a notice in compliance with the Act.

In the course of his judgment, Lord Justice Brett made the following important observations on the requisites of a notice: "However, the notice under this Act is not to be deemed invalid by reason of any defect or inaccuracy, unless the judge who tries the action is of opinion that the defendant is prejudiced by it, and that the defect or inaccuracy was for the purpose of misleading. It seems therefore, to me, that a notice might be available even if it should be defective in any of the matters required to be stated; as, for instance, if it did not in terms name the day when the injury was

sustained, but showed it by reference, as also if it did not describe the cause of the injury with sufficient particularity, but still did not describe it so as to mislead. I agree that, as a general rule, the notice must be given in one notice, but I am not prepared to say that it would be fatal if it were contained in more than one notice. Suppose, for example, a person in his letter written on one day should describe the injury he had sustained, but should leave out his address, and he should the next day send a letter stating that in the letter I wrote yesterday, I omitted to give you my address, and I now give it. If both these letters were written in time and both served upon the employer, I am not prepared to say that the last might not be taken to incorporate the first, and therefore, though not an accurate, but an informal notice, it might be considered a notice within the meaning of the statute."

In *Clarkson v. Musgrave* (9 Q. B. D. 386), the plaintiff's notice stated that Jane Clarkson "was injured in consequence of your negligence in leaving a certain hoist in your warehouse unprotected, whereby the said Jane Clarkson had her foot caught in the casement of the said hoist, and her foot and leg were severely injured, and the said Jane Clarkson will claim compensation for such injuries." At the trial in the County Court the jury found that the accident occurred through the negligence of a superintendent in the warehouse, in allowing the plaintiff, a young girl, to go in the hoist alone. It was contended that the notice was bad, inasmuch as it alleged, as the negligence, the leaving the hoist unprotected, whereas the jury had found it was the allowing the plaintiff to go in the

hoist alone. This objection was overruled and the notice held good.

Field, J., said: "The statute was meant for the use of unlearned persons. Sect. VII. only requires that the notice of action shall state in ordinary language the cause of the injury. It is not necessary to state the cause of action but only that which will enable the employer to have substantial notice of what has occurred, so that he may make proper inquiries, and may come to trial prepared to meet the plaintiff's case."

The case of *Stone v. Hyde* (9 Q. B. D. 76) is another case which shows that the judges incline to a most liberal construction of the Act in favour of the workmen with regard to technical objections to notice under sects. IV. and VII.

In that case the notice was a letter from the plaintiff's solicitor, which gave only the date of the injury, and stated that the plaintiff was and had for some time past been under treatment at a hospital "for injury to his leg." The County Court Judge before whom the action was brought held that this was not sufficient notice, and that it was a defect or inaccuracy which would prejudice the defendant, and accordingly non-suited the plaintiff.

The Queen's Bench Division reversed the decision. Mr. Justice Matthew said: "Now, when we consider that the object of the legislature in passing this Act was to confer a benefit upon the working classes, I think it would be unreasonable and unjust and contrary to the spirit and intention of the Act, to require these notices to be framed with all the particularity of a Statement of Claim." As the County Court Judge had not set

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out the facts upon which he came to the conclusion that the defect was one which would prejudice the defendant, the Court held there was no evidence of this also, and granted a new trial.

*Sect. VIII.*—Definition.

For the purposes of this Act, unless the context otherwise requires—

The expression “person who has superintendence entrusted to him” means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour :

The expression “employer” includes a body of persons corporate or unincorporate :

The expression “workman” means a railway servant and any person to whom the Employers and Workmen Act, 1875, applies.

*Note.*—As to what is a person who has superintendence entrusted to him, see *Shaffers v. The General Steam Navigation Co.*, cited *ante*, p. 268.

Sect. 10 of the Employers and Workmen Act, 1875, thus defines a workman :

“The expression workman does not include a domestic or menial servant, but save as aforesaid means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner or otherwise engaged in manual labour, whether under the age of twenty-one or above that age, has entered into or works under a contract with an employer, whether the contract be made before or after the passing of this Act, be expressed, implied, oral, or in writing, and be a contract of service or a contract personally to execute any work or labour.”

*Sect. IX.*—(Act to commence 1st January, 1881.) ,



*Sect. X.*—(Short title of Act, “Employers’ Liability Act,” 1880, shall continue in force until 31st December, 1887.)

*Lord Campbell’s Act.*—By the statute 9 & 10 Vict. c. xciii. it is enacted that when the death of a person shall be caused by any wrongful act, neglect, or default, which, if death had not ensued, would have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, although the death shall have been caused under such circumstances as amount in law to felony. And (by sect. 2) that every such action shall be for the benefit of the wife, husband, parent, and child of the deceased person, and shall be brought by and in the name of his executor or administrator, and the damages recovered, after deducting certain costs, shall be divided amongst the before-mentioned relatives, in such shares as the jury, by their verdict, shall find and direct. But not more than one action shall (by sect. 3) be in respect of the same subject matter of complaint, and the action must be commenced within twelve calendar months after the death of the deceased person. And (by sect. 4) the plaintiff must deliver, together with the declaration of his cause of action, full particulars of the persons on whose behalf the action is brought, and of the nature of the claim. By the Amendment Act 27 & 28 Vict. c. xcv. it is provided by sect. 1 that when no action is brought within six months by the executor then it may be brought by persons beneficially interested in the result of the action.

## CHAPTER XVII.

### MANSLAUGHTER.

INASMUCH as charges of manslaughter arising out of the deaths of persons employed in collieries occur from time to time, this work would be incomplete without a brief notice of the leading rules and cases of the criminal law upon this subject. Whoever wrongfully, but without malice aforethought, kills any other person, is guilty of manslaughter. This head of crime includes deaths caused voluntarily, but under extenuating circumstances, as well as deaths caused involuntarily but not merely by misadventure. It is to this latter class of deaths alone that this section will be confined. The general rule is that where death results from want of due caution on the part of a person, either in doing an act, or, secondly, from his neglecting to perform a duty which is cast upon him by the law, such person is guilty of manslaughter. The first branch of this rule applies, for instance, to a case where stones are thrown from a height into the street, without the intention of striking any person, but also without reasonable care, and a second branch applies to a case where a pointsman in charge of

railway points omits to do his duty and thereby causes the death of a passenger in a train.

In *R. v. Haines* (2. Car. & Kir. 368), it was the duty of the defendant, as ground bailiff of a mine, to put up air-headings where they were required. It was alleged by the prosecution that by reason of his omission in this respect a man was killed, and he was indicted for manslaughter. For the defence it was contested that death would not have ensued but for the negligence of other persons. The law was then laid down by Mr. Justice Maule, who told the jury—If they found that it was the prisoner's plain and ordinary duty to have caused an air-heading to have been made, and a man using reasonable diligence would have done it, and that by reason of his omission he was guilty of a want of ordinary and reasonable precaution, and that by reason of such omission deceased was killed, they should find him guilty of manslaughter. It is no defence in a case of manslaughter that the death was caused by the negligence of others as well as that of the prisoner; for if the death be caused partly by the negligence of the prisoner and partly by the negligence of others, the prisoner and all those others are guilty of manslaughter.

In the case of *R. v. Hughes* (7 Cox's C. C. 301), the prisoner was indicted for manslaughter. The death was occasioned by the falling of a truck full of bricks into the shaft of a mine where the deceased was at work. The truck fell in owing to the prisoner's neglect of duty in omitting to place a stage over the mouth of the shaft. It did not appear that the

prisoner was directing or driving the truck at the time. Mr. Baron Watson left it to the jury, whether the accident happened by negligence of the prisoner, and whether that negligence arose from an act of *omission or commission*. They found that the death arose from negligent omission on the part of the prisoner in not putting the stage on the mouth of the shaft. After consideration, the judgment of the Court of Criminal Appeal was delivered by Lord Campbell. He said: "We are of opinion that this conviction should be affirmed. It was the duty of the prisoner to place the stage on the mouth of the shaft. The death of the deceased was the *direct consequence* of the omission to perform this duty. If the prisoner of malice aforethought, and with the premeditated design of causing the death of the deceased, had omitted to place the stage, and the death had thereby been caused, the prisoner would have been guilty of murder. If the omission was not malicious, and arose from negligence only, it is a case of manslaughter. There is no authority for the position that without an act of commission there can be no manslaughter. On the contrary the doctrine is well established, that what constitutes murder, being by design and of malice prepense, constitutes manslaughter when arising from culpable negligence."

The case of *R. v. Bennett* (8 Cox's C. C. 74) is a very important one on the subject of criminal negligence. The prisoner had for years been accustomed to keep fireworks in a house in London for sale. Part of the process of manufacture of some of them was carried on in his house, contrary to the statute 9 & 10

Will. III. c. vii. By the supposed negligence of one of his servants an ignition of red fire was caused, which communicated to the other fireworks, and a rocket shot across the street, and set a house on fire, by which the death of a person was caused. The prisoner was out of the house at the time, and did not personally interfere in any way. The conviction was held wrong. The Lord Chief Justice said: "The keeping of the fireworks in the house caused the death only by the superaddition of the negligence of someone else. The keeping of the fireworks may be a nuisance, and if from that unlawful proceeding the death had ensued as a necessary and immediate consequence, the conviction might be upheld. But the keeping them did not alone cause the death, but that act of the defendant *plus* the act of somebody else did. The defendant therefore was not liable." In other words, it appeared that as the proximate cause of the death was the negligence, not of the defendant, but of the servant, and that servant's negligence was in no way connected with the keeping of the fireworks, no personal responsibility attached to the owner, although he might have been indicted for a nuisance.

In the case of *R. v. Lowe* (4 Cox's C. C. 449), the prisoner was charged with manslaughter. He had been employed to attend the steam-engine, by which the skip or basket was raised or let down the shaft with the workmen. When the men came up, it was the prisoner's duty to set the engine in motion to raise the skip until it reached about two feet above the mouth of the pit, and then to stop the engine, so as to allow a waggon to be moved over the mouth to

enable the men to get out of the skip with safety. The prisoner one day left the engine in the care of a lad of fifteen. The deceased made the signal for the skip to be drawn up to the boy at the top, who signalled to the boy who had the charge of the engine. The latter set the engine to work, but failed in stopping it at the proper time, from ignorance of the duty. The consequence was, that the skip was drawn up to the pulley, and the deceased was forced out, fell down the shaft, and was killed. The opinion of the judge was taken, as to whether a man whose duty it is to attend at a particular place, or fill a particular office, and omits to attend, and leaves an incompetent person in his place, and death ensues, is guilty of manslaughter. Lord Campbell said: "I am clearly of opinion that *an act of omission, as well as of commission*, may be so criminal as to be the subject of an indictment for manslaughter, and that there is evidence to go to the jury of such a criminal omission in this case."

From the previous cases and quotations, the general principle is made clear that bailiffs, overmen, and all persons in offices and situations in coal mines who have duties to perform, on the due and careful performance of which the lives of others depend, are bound to bring to the exercise of those duties ordinary and reasonable precaution. But no man can be convicted of manslaughter for a mere mistake, or error of judgment. If he acts to the best of his judgment or ability in the discharge of his duty, but acts erroneously from want of good judgment, he is not criminally responsible. If he is seeking to do the

best he can under the circumstances, and is acting to the best of his judgment, however unfortunate that judgment may be, he is not to suffer for his innocent error. But at the same time every person who undertakes a duty or office is bound to bring to it *ordinary* care, skill, and diligence. It is the absence of *ordinary* not *extraordinary* precaution or care that makes negligence culpable. It is a matter which is not capable of a closer definition. Each charge of criminal negligence, depending on its own surrounding circumstances, must be left to the jury, with general advice to say whether in their opinion the alleged negligence or omission was so gross as to justify them in finding the accused guilty of manslaughter.

To conclude this section it need only be added that the alleged negligence must be personally brought home to the party charged. Thus, where in Hilton's case (reported in Lewin's Crown Cases), the prisoner was indicted for manslaughter, it appeared that it was his duty to attend to a steam-engine. On the occasion in question he had stopped the engine and gone away, and during his absence another person set it in motion and could not stop it, and in consequence of this the deceased was killed. The prisoner had no doubt been negligent in his duty, but Mr. Baron Alderson said, that as the death was not the *immediate consequence* of the act of the prisoner he must be acquitted. It was necessary, he added, for a conviction for manslaughter, that the negligent act which causes the death should be that of the party charged.

## CHAPTER XVIII.

### TRUCK.

OFFENCES under the Truck Act, 1 & 2 Will. IV. c. xxxvii. consist in the payment of the wages of colliers and other classes of workmen there specified, otherwise than in coin.\* The statute enacts that any contract in which the whole or any part of the wages shall be made payable in any other manner than in the current coin of the realm, (sect. 1), or in which any provision shall be made directly or indirectly respecting the place where, the manner in which, or the person with whom, any part of the wages shall be laid out or expended, is absolutely void. (Sect. 2.) The entire amount of wages shall be actually paid in coin, and not otherwise; and any payment made by the employer by the delivery of goods, or otherwise than in coin, except as therein mentioned, is also void. (Sect. 3.) The artificer or collier may recover so much of his wages as shall not have been actually paid in coin, and the employer may not set off the value of any goods

\* Originally, truck meant barter or exchange; but it has now acquired the technical meaning above given.



supplied to the collier, at any shop or warehouse kept by or belonging to the employer, or in the profits of which he has any share or interest. (Sects. 4 and 5.) No action will lie to recover the value of such goods; and if the collier or his wife, widow, or child become chargeable to any parish, the amount of wages earned by such person within the three preceeding calendar months, and not paid in cash, may be recovered by the overseer. (Sects. 6 and 7.) The order for wages may be made and served on any one or more of co-partners. (Sect. 13.)

The statute applies to the case of artificers, workmen, labourers, and other persons employed in or about the working or getting of any mines of coal, ironstone, limestone, &c., and many other employments which need not be mentioned here.

*Stoppages.*—But nothing in the Act is to extend to prevent any employer of any artificer, or any agent of such employer, from supplying or contracting to supply to any such artificer any medicine or medical attendance; or any fuel, or any materials, tools, or implements to be by such artificer employed in his trade or occupation, if such artificer be employed in mining; or any hay, corn, or other provender to be consumed by any horse or other beast of burden employed by any such artificer in his trade and occupation; nor from demising to any artificer, workman, or labourer employed in any of the trades or occupations enumerated in the Act the whole or any part of any tenement, at any rent to be thereon reserved; nor from supplying, or contracting to supply, to any such artificer any victuals, dressed or prepared under the

roof of any such employer, and there consumed by such artificer ; nor from making, or contracting to make, any stoppage, or deduction, from the wages of such artificer for or in respect of any such rent, or for or in respect of any such medicine or medical attendance ; or for or in respect of any fuel, materials, tools, implements, hay, corn, or provender, or of any such victuals, dressed and prepared under the roof of such employer, or for or in respect of any money advanced to such artificer for any such purpose as aforesaid ; provided that such stoppage or deduction shall not exceed the real and true value of such fuel, materials, tools, implements, hay, corn, and provender, and shall not in any case be made from the wages of such artificer, unless the agreement or contract for such stoppage, or deduction, shall be in writing, and signed by such artificer. (Sect. 23.)

No justice engaged in any of the trades or occupations enumerated in the Act, or being the father, son, or brother of any such person, is to act as a justice under this Act. When the magistrates for any borough are disqualified by the provision, the complaint may be heard by the magistrates of the county in which the offence is committed, and the complainant may remove his information to any Court of Petty Sessions within twelve miles of such borough. (Sect. 23.)

The prosecution must be commenced within three calendar months. Any employer of an artificer in the trades to which the Act applies, who shall by himself, or by the agency of any other person, directly or indirectly enter into any contract, or make any payment, declared to be illegal thereby, is liable, for the first

offence, to a penalty not exceeding ten pounds and not less than five pounds; and for a second offence, not exceeding twenty nor less than ten pounds; and for a third offence, be guilty of a misdemeanour, punishable by fine only, not exceeding one hundred pounds. (Sect. 9.)

These penalties are recoverable before two justices, or one stipendiary magistrate, the offender having been previously served with a summons, either personally or left at his place of business or residence, such residence being the place used for carrying on his business. On non-payment of the penalty and costs they may be levied by distress. If it appears by confession, or on the oath of a witness, that there are not sufficient goods within their jurisdiction, the justices may commit the offender to gaol for three calendar months, unless the penalty and costs be sooner paid. But no partner is to be liable in *person* for the offence of his co-partner, committed without his knowledge or consent. All workmen and other persons engaged in the performance of any work, of what nature soever, are to be deemed "artificers." All masters, bailiffs, foremen, managers, clerks, and other persons, engaged in the hiring, employment, or superintendence of the labour of artificers, are to be deemed "employers." Any money or other thing had or contracted to be paid, delivered, or given as a recompense, reward, or remuneration for any labour done, or to be done, in a certain or uncertain time, or to a certain or uncertain amount, is to be deemed "wages;" and the word "contract" is to be construed in the largest possible sense.

This Act was formerly held to apply to a working collier who is paid by the ton, and who was at liberty to employ other men to assist him, if the Court find that the agreement amounts to a contract for *personal service*.\* But this decision is now overruled, and the real test of the application of the Act is whether the contract is for labour or for the results of labour.† In the case of *Ingram v. Barnes* (26 L. J., Q. B. 32), the plaintiff, a labouring man, entered into a contract to make as many bricks for the defendant as he might require; the defendant to find all materials, and the plaintiff to find the labour, for 10s. 6d. a thousand. The work was to be done under the direction of the defendant. The plaintiff himself, assisted by others, employed by him, laboured in the making of the bricks under the contract. The defendant partly paid the plaintiff by tickets for goods. The Court of Queen's Bench held that the plaintiff was not an artificer working for wages within the Truck Act, as he was not bound to do the work personally. Lord Chief Justice Cockburn said that "the Act is to be taken as applicable to persons only who strictly contract as labourers, that is, to such as enter into a contract to employ their personal services and to receive payment for that service in wages. The intention of the 1 & 2 Will. IV. c. xxxvii. was to afford protection to a class of persons not very able to protect themselves. The persons the Act was meant to benefit are those who hire themselves to labour with their hands for daily or weekly wages, and it was not

\* *Floyd v. Weaver*, 21 L. J. 151.

† *Sleeman v. Burratt*, 33 L. J. n. s., Ex. 153.

at all designed for the protection of persons taking contracts for labour to be done by other persons who speculate upon the state of the labour market. . . . The statute is intended to protect those persons only who engage themselves as artificers and labourers, not persons entering into contracts as contractors. This is manifest when the different sections are looked at. The first speaks of the hiring of an artificer, to be paid by wages. The third uses the expression 'wages earned' in respect of any labour to be done by him. Sect. 5 speaks of the 'wages of *his* labour.' These sections all refer to the case of a man engaging to furnish his own labour as an artificer or labourer, to be paid for it by wages, and altogether distinguish it from the cases in which a man contracts to get work done." The case of *Floyd v. Weaver* was cited, in which Wightman, J., and Patterson, J., appear to have been of opinion that though a man may employ others, if he engages to do a portion of the work himself, that would be within the statute. "It is not necessary for us to review or overrule that decision, but it deserves serious consideration how far it can be supported; but both judges agree in this, that if the party was *only at liberty* to use his own labour, but *not bound to work himself*, he was not within the statute." And Mr. Baron Martin said that "if the contention for the plaintiff were right, it would follow that a justice of the peace, though he could have no original jurisdiction with respect to the contract itself, yet might order payment again if the payment of the 10s. 6*d.* per thousand had been made in goods." And Mr. Baron Bramwell added: "What-

ever definition one gives to the term 'wages,' a portion of what the plaintiff gets here is profits made and makeable by the employment of other people under him. If a portion is that, the whole is not wages. If the whole is not wages, it is not a case within the statute, for the statute contemplates that the remuneration shall be wages and nothing more."

In the case of *Sleeman v. Todd* (33 L. J. n. s. Ex. 153) it was held that butty colliers working under verbal contracts, generally by the day, but also by the ton or yard, not being allowed to underlet the work, or to work elsewhere, but doing it as they liked, and in fact working themselves and employing men under them, for whose wages they were responsible, were not within the Truck Act. Chief Baron Pollock said: "The case is within the Truck Act or not, according as the contract is for mere labour or for the result of labour;" that is, for the effect that labour is to produce, as in a contract for the removal of a quantity of clay.

In the case of *Millard v. Kelly* (22 J. P. 736), the question was whether Millard was rightly convicted under the Truck Act for the payment of wages in shop goods to Kelly. It was contended that Kelly was not an artificer within the Act. The 19th sect. extends the operation of the statute to artificers, labourers, &c., and other persons employed in and about the manufacture of iron and other specified trades. It appeared that Kelly was employed in the vicinity of certain iron-works in unloading boats which conveyed the coal for the use of the works. The canal was a private branch belonging to the proprietors of the works, and ran into the middle of the works. The wharf where Kelly worked was in the

middle of the works. He was also employed in loading iron into the empty coal-boats. The defendant was not himself an iron-master, but a contractor, carrying coal and iron at a certain price per ton. The Court said: "The defendant is employed in loading the manufactured iron. That is quite decisive."

*Stoppages from Wages.*—In the case of *Archer v. James*,\* a question arose upon sect. 3 of the Truck Act, which enacts that "the entire amount of the wages earned, &c., shall be actually paid to the artificer in the current coin of the realm, and not otherwise." The plaintiff was a frame-work knitter, working in the factory of the defendant, and was paid at the rate of 7*d.* a dozen. But from this payment there were certain *stoppages* deducted, under the heads of frame-rent, steam, gas, firing, and waiting-room, &c. It was contended that these stoppages were illegal, and amounted in fact to a payment of wages other than in the coin of the realm. But it was held by the Court of Queen's Bench that such deductions or stoppages were not illegal. Mr. Justice Wightman remarked, that whatever doubt he might have entertained if this case had now come before the Court for the first time, he thought himself bound by the decision in *Chowner v. Cummings* (8 Q. B. 311).

In that case the plaintiff was a weaver of gloves for the defendant in frames provided by the latter at an agreed gross price per dozen pairs. The defendant was a sub-contractor. He settled with the plaintiff weekly, and deducted out of the gross price certain charges according to the known custom of the trade—such as a frame-rent for use of defendant's premises,

\* 1 Cox's Magistrates' Cases, 2.

defendant's loss of time in procuring materials and conveying them to the plaintiff, superintendence of the work, sorting the goods, payment to a boy for winding yarn, &c. &c. There was no written contract. It was held that the agreement to pay plaintiff's wages with these deductions was not a contract to pay part of such wages otherwise than in the current coin within sect. 1, nor was a contract in writing under sect. 23 necessary to legalise such deductions.

The decision of the Court of Queen's Bench in *Archer v. James* was appealed against and argued in the Exchequer Chamber. The six judges were equally divided, and consequently the judgment of the Court below was affirmed.

In the case of *Cutts v. Ward* (4 Cox's Magistrates' Cases, p. 328), it appeared that the plaintiff was engaged as a collier, and had signed certain rules, one of which provided that all rents of houses due to the owner of the works, and all charges to which a workman should be liable for wood, tools, or working materials obtained from the stores, and for medicine and medical attendance and all other lawful stoppages, should be deducted from the earnings of each workman before payment thereof. Certain wages having become due to the plaintiff, stoppages were made, (1) for rent; (2) for wood used by him belonging to the defendant to support the mine; (3) for subscriptions to a club established by defendant to afford medicines and medical attendance to the men in sickness. It was held that the first and third deductions were lawful as being within the 23rd sect. of 1 & 2 Will. IV. c. xxxvii., but that the second was not lawful as not being within it.



Again, if an artificer receive *of his own accord* goods at a shop kept by his employer, and the amount is afterwards deducted from his wages at the next settling, this is a payment in goods which comes within the statute. *Wilson v. Cookson* (32 L. J. M. C. 117, and 13 C. B. Rep. 496). And if payment of wages has been made in goods no subsequent payment of the same cash can purge the offence, because the payment is made void, not voidable, by the statute.

In the case of *Smith v. Walton* (L. R. 3 C. P. 109), an artificer in a trade within the Truck Act, having by bad work damaged a piece of cloth, his employers delivered to him that cloth in lieu of such wages as they deemed equivalent to the value which, according to *their* assessment, the cloth would have had if it had been undamaged. The justices dismissed the information under the Truck Act. But on appeal it was held that it was substantially a payment of wages, otherwise than in the current coin of the realm. Mr. Justice Lindley said: "To understand the substance of the transaction, it is necessary to look at the mode in which the two weeks' wages were adjusted. The appellant had earned at the end of one week 18s. 8½*d.*, and at the end of another £1 2s. 6½*d.*, making £2 1s. 3*d.* When they settled, the employers paid him 20s. in cash, and no more, leaving £1 1s. 3*d.* unpaid. How was it made up? The employer said: 'I will not give you that sum; I have paid it you in goods you have spoiled, which we value at £1 1s. 3*d.*' So they squared accounts by deducting that amount. If that is the transaction, it is within the Truck Act."

A more recent case throws light upon stoppages from wages. In the case of *Pillar v. The Llynvi Coal*

Company (L. R. 4 C. P. 752), an employer stopped part of the wages of an artificer as a contribution to funds established by the former to provide medicine and medical attendance and schools *without* any written agreement. It was held that the artificer might recover the whole amount so deducted. The Court said "these stoppages were made, and there was no consent in writing. We think that upon a right construction of sects. 23 and 24 such a written consent was necessary to enable the company to make the deductions, and we are obliged to hold that the plaintiff may recover the whole." But in the case of *Cutts v. Ward*, previously referred to, the principle was established that if the contract of service specifies *generally* the deductions to be made, although the exact sums are not fixed, the contract will still be valid if the deductions are such as are comprised in sect. 23.

The evil of truck chiefly arises from the power which employers might use—were it not for the statute—to induce workmen to take goods in payment at an undue profit to the former, or of inferior quality, or for which the workman has no particular need. If, indeed, the goods were excellent and the price fair, no great harm would ensue. But, if any advantage should ever arise to the workman from payment in goods, it would depend wholly on the justice, care, and benevolence of the employer. It has generally been found that it places the man at the mercy of the master, without any countervailing benefit to the former. The Act is a highly beneficial one to the working classes, and ought to be strongly enforced on their behalf.

## CHAPTER XIX.

### CONSPIRACY, MOLESTATION, AND STRIKES.

THE Conspiracy and Protection of Property Act, 1875, has made important alterations in this branch of the law since the last edition was printed. It amended the law relating to conspiracies, by the 3rd sect., as follows: "An agreement or combination by two or more persons to do, or procure to be done, any act in contemplation or furtherance *of a trade* dispute between employer and workmen shall not be indictable as a conspiracy if *such act, committed* by one person, would not be punishable as a crime." And a "crime" means, in this connection, an offence punishable on indictment or summary conviction, for the commission of which the offender may be imprisoned, either at once or as an alternative for some other punishment. But the Act does not exempt from punishment persons guilty of a conspiracy for which a punishment is awarded by an Act of Parliament; nor does it extend to riots, unlawful assemblies, breaches of the peace, sedition, &c.

Sect. 5 contains a very important enactment: "Where any person wilfully and maliciously breaks a contract of service or hiring, knowing, or having

reasonable cause to believe, that the probable consequences of so doing will be to endanger human life, or cause serious bodily injury, or expose valuable property to destruction or serious injury, he shall, on conviction, be liable either to pay a penalty not exceeding £20, or be imprisoned not exceeding three months."

The clauses just quoted are important; but the clause which is most likely to be brought into operation from time to time is the seventh. "Every person who, with a view to compel any other person to abstain from doing, or to do, any act which such other person has a legal right to do, or abstain from doing wrongfully and without legal authority, (1) uses violence to or intimidates such other person, or his wife, or children, or injures his property; or, (2) persistently follows such other person about from place to place; or, (3) hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or, (4) watches or besets the house or place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place; or, (5) follows such other person with two or more other persons in a disorderly manner in or through any street or road, shall be liable to a penalty not exceeding £20, or to be imprisoned for a term not exceeding three months. But attending at or near a house, &c., in order merely to obtain or communicate information shall not be deemed a watching or besetting within the Act."

*Procedure.*—When a person is accused before a Court of summary jurisdiction of any such offence, he

may object to be so tried, and the Court may commit him for trial by a jury. In all cases of conviction by a Court of summary jurisdiction an appeal lies to the Quarter Sessions. Wherever a stipendiary magistrate is appointed he will have exclusive jurisdiction.

The word "maliciously," in the statute, means purposely, as distinguished from accidentally or ignorantly.

Prior to the passing of the important Act 38 & 39 Vict. c. xxxvi. there was much dispute as to what conduct was, and what was not, within the prohibitions of the law. But the new statute is clear and simple, and easy of interpretation, and is not likely to give rise to difficult controversies. Each case will have to be decided upon by its own peculiar facts and circumstances, either by the magistrates or a jury.

The security of perfect freedom of action both for employers and employed is the chief object which the legislature had in view. This was clearly stated by Lord Bramwell as a principle of the common law, in a case in which he gave judgment before the new Act was passed. He said that "by the common law, liberty of a man's mind and will, how he should bestow himself, and his means, his talents, and his industry, was as much the subject of the law's protection as was that of his body. Therefore, if two or more persons agreed to co-operate against that liberty of thought and freedom of will, they would be guilty of a conspiracy. And if any person by threats, intimidation, or molestation, or in any other way, endeavour to deter or influence any person in the employment of his industry, talents, or capital, in any lawful manner, or to obstruct, force, or endeavour to force, any journeyman to depart from his

hiring, or to prevent him from hiring himself, he would be guilty of an offence against the statutes."

The same principle was stated by that eminent judge, Mr. Justice Pattison, with reference to the legislation of that time: "The object of the legislature was that all masters and workmen should be left free in the conduct of their business. The masters were at liberty to give what rate of wages they liked, and to agree among themselves what rate of wages they would pay. In like manner the workmen were at liberty to agree among themselves for what wages they would work, and were not restricted in so doing by the circumstance that they were in the employ of one or other of the masters. The intention of the legislature was to make them quite free."

It may be useful to add a few remarks with reference to "strikes." The term "strike," as it is now generally used, requires some explanation. In a notion of a strike in former times some breach of contract or unlawful proceedings on the part of the working men concerned in it was commonly involved. Some dispute would arise or offence be taken, justly or unjustly, and thereupon in lieu of fulfilling their legal obligations, the men would break all ties and lay down their tools. In this respect there is now a great alteration. There is usually no illegal ingredient in our modern strikes. The custom is to give notice that in the event of certain demands not being conceded by the employers, the employed will not renew their contracts at the close of the current period. In this, of course, there is nothing illegal. Occasionally, but rarely, the old-fashioned strike still takes place. But, as a rule, the working

men are too well informed and advised to plunge into useless troubles. A "strike" may, therefore, be described as an arrangement between the workmen engaged in one or more works or collieries, &c., to give *simultaneously legal* notices to put an end to their respective contracts. It is, of course, intended thereby to put a powerful pressure on the interests of the employers. So powerful, indeed, is it, that in Belgium and some other countries it is made an offence so to apply it. In this country, however, the working men who follow this course are strictly within their rights.

The term conspiracy is divisible into three heads :

(1) Where the end to be attained is in itself a crime.

(2) Where the object is lawful, but the means to be resorted to are unlawful.

(3) Where the object is to do an injury to a third party or a class, though if the wrong were inflicted by a single individual, it would be a wrong and not a crime. *Reg. v. Parnell* (No. 3), (14 Cox C. C. 508 Ir. Q. B. Div.).

## CHAPTER XX.

### CRIMINAL STATUTES RELATING TO COLLIERIES.

IN the year 1861 an Act of Parliament was passed entitled an "Act to Consolidate and Amend the Statute Law relating to Larceny and other similar Offences." This statute is our present criminal code, and contains all the principal enactments now in operation relating to offences connected with minerals and mines. First, as to larceny from mines, it is enacted by sect. 33 of the 24th & 25th Vict. c. xvi., that "Whosoever shall steal or sever with intent to steal the ore of any metal, etc. . . . or any coal, or cannel coal from any mine, bed, or vein thereof, respectively, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour," &c.

By the 17th sect. of the Act 24 & 25 Vict. c. xvii. it is enacted that whosoever shall be convicted of unlawfully and maliciously setting fire to any *stack* of coals, charcoal, wood, &c., shall be liable to a similar punishment. By sect. 26 it is enacted that whosoever shall unlawfully and maliciously set fire



to any *mine* of coal or other mineral fuel shall be guilty of felony, and be liable to penal servitude for life, or other lesser punishments; and by sect. 27: Whosoever shall *attempt* to set fire to any mine under such circumstances, that, if the mine were thereby set on fire, the offender would be guilty of felony, and being convicted, shall be liable to penal servitude for fourteen years, or other minor punishments.

By sect. 28 of the same statute it is enacted that whosoever shall unlawfully and maliciously *cause any water* to be conveyed or run into any mine or into any subterraneous passage communicating therewith, with intent thereby to destroy or injure the mine, or to hinder or delay the working of it; or, with the like intent unlawfully and maliciously pull down, fill up, or obstruct or damage with intent to destroy, obstruct, or render useless any air-way, water-way, drain, pit, level, or shaft of or belonging to any mine, shall be guilty of felony; and, being convicted, shall be liable to penal servitude for seven years, or other minor punishments.

By sect. 29 of the same Act, it is enacted that whosoever shall unlawfully and maliciously pull down, destroy, or damage, with intent to destroy or render useless any steam-engine, or other engine for sinking, draining, ventilating, or working . . . any mine, or any appliance or apparatus in connection with any such steam or other engine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, or waggon-way, or trunk for conveying minerals from any mine (whether it be completed or unfinished), or unlawfully and maliciously stop, or

obstruct the working of such engine, &c., with intent to destroy or damage any mine, or wholly or partially cut through, sever, break, or unfasten, or damage, with intent to destroy or render useless any *rope, chain, or tackle* used in any mine, &c., shall be guilty of felony, and, being convicted, shall be liable to penal servitude for seven years, or certain minor punishments.

Sect. 58 of the same statute refers to the expression "maliciously," often occurring in the extracts above given, and it enacts that the punishments imposed upon any person *maliciously* committing any offence shall equally apply, and be in force, whether the same be committed from malice conceived against the owner of the property in respect of which it shall be committed, or otherwise. In addition to the above enactments, there is a general clause (sect. 52) in the same statute, enacting that whosoever shall wilfully or maliciously commit damage to any real or personal property whatever (not specially provided for in other clauses), to an amount exceeding £5, shall be guilty of a misdemeanour, and may be indicted at Assizes or Quarter Sessions; and when it does not exceed £5, may be summarily convicted before one or more justices of the peace, and be imprisoned for a limited period, or ordered to pay a penalty not exceeding £5, and compensation for the injury done. The language of this clause differs from that of the preceding ones. The words in sect. 52 are wilfully *or* maliciously, not unlawfully *and* maliciously. Consequently mischief done purposely, *or* from some ill will, would come within this provision of the Act. The word "maliciously" must be understood as meaning purposely,

as distinguished from acts done ignorantly or accidentally. But the general rule is that where a man commits an unlawful act unaccompanied by circumstances justifying its commission, it is a presumption of law that he did it advisedly, and with intent to produce the consequences that ensued. There is, however, another general proviso that the section is not to extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act. When that supposition is made apparent, the jurisdiction of the magistrates is ousted.

A.D. 1872.

## CHAPTER XXI.

AN ACT TO CONSOLIDATE AND AMEND THE ACTS RELATING  
TO THE REGULATION OF COAL MINES AND CERTAIN  
OTHER MINES. 35 & 36 VICT. C. 76.

[10th August, 1872.]

WHEREAS it is expedient to consolidate and amend the law relating to the regulation and inspection of coal mines and certain other mines :

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

### *Preliminary.*

Short title. 1. This Act may be cited as "The Coal Mines Regulation Act, 1872."

Commence-  
ment of Act. 2. This Act, except as herein-after provided, shall not come into operation in England and Scotland until the first day of January one thousand eight hundred and seventy-three, and in Ireland until the first day of January one thousand eight hundred and seventy-four, which dates are in this Act respectively referred to as the commencement of this Act.

3. This Act shall apply to mines of coal, mines A.D. 1872.  
of stratified iron-stone, mines of shale, and mines of Application  
fire-clay. of Act.

## PART I.

### *Employment of Women, Young Persons, and Children.*

4. No boy under the age of ten years, and no woman Employ-  
or girl of any age, shall be employed in or allowed to ment of  
be for the purpose of employment in any mine to which women and  
this Act applies below ground. children in  
mines.

5. A boy of the age of ten and under the age of Employ-  
twelve years shall not be employed in or allowed to be ment of  
for the purpose of employment in any mine to which boys in  
this Act applies below ground, except in a mine in mines.  
which a Secretary of State, by reason of the thinness  
of the seams of such mine, considers such employment  
necessary, and by order, published as he may think fit,  
for the time being allows the same, nor in such case

- (a) for more than six days in any one week ; or,
- (b) if he is employed for more than three days in  
any one week for more than six hours in any  
one day ; or,
- (c) in any other case for more than ten hours in any  
one day ; or,
- (d) otherwise than in accordance with the regu-  
lations herein-after contained.

6. A boy of the age of twelve and under the age of Hours of  
thirteen years, and a male young person under the age employ-  
of sixteen years, shall not be employed in or allowed ment of  
to be for the purpose of employment in any mine boys and  
to which this Act applies below ground for more than male young  
persons in  
mines.

A.D. 1872. fifty-four hours in any one week, or more than ten hours in any one day, or otherwise in accordance with the regulations herein-after contained.

Regulations as to employment of boys and male young persons. 7. For the purpose of the provisions of this Act with respect to the employment of boys and male young persons in a mine below ground, the following regulations shall have effect; that is to say,

(1) There shall be allowed an interval of not less than eight hours between the period of employment on Friday and the period of employment on the following Saturday, and in other cases of not less than twelve hours between each period of employment:

(2) The period of each employment shall be deemed to begin at the time of leaving the surface, and to end at the time of returning to the surface:

(3) A week shall be deemed to begin at midnight on Saturday night, and to end at midnight on the succeeding Saturday night.

Regulations as to education with respect to boys. 8. The following regulations shall have effect with respect to boys of the age of ten and under the age of twelve years employed in any mine to which this Act applies below ground:

(1) Every such boy shall attend school for at least twenty hours in every two weeks during which he is so employed:

(2) In computing for the purpose of this Act the time during which a boy has attended school there shall not be included any time during which such boy has attended either,

(a) In excess of three hours at any one

time, or in excess of five hours on any one day, or in excess of twelve hours in any one week ; or,

(b) on Sundays ; or

(c) before eight o'clock in the morning or after six o'clock in the evening :

Provided that the non-attendance of any boy at school shall be excused—

- (1) For any time during which he is certified by the principal teacher of the school to have been prevented from attendance by sickness or other unavoidable cause :
- (2) For any time during which the school is closed for the customary holidays, or for some other temporary cause ; and
- (3) For any time during which there is no school which the boy can attend within two miles (measured according to the nearest road) from the residence of such boy or the mine in which he works.

The immediate employer of a boy in every mine to which this Act applies, who has employed such boy for any time amounting in the whole to not less than fourteen days, shall on Monday in every week during the employment of such boy obtain from the principal teacher of some school a certificate that the boy so employed has in manner required by this Act attended school during the preceding week, if attendance at school was so required during that week.

The certificate may be in such form as a Secretary of State may from time to time prescribe.

The immediate employer, where he is not the owner,

A.D. 1872. agent, or manager of the mine, shall deliver such certificate to the owner, agent, or manager of the mine, and the owner, agent, or manager shall obtain the delivery of such certificate, and shall keep any certificate obtained or delivered in pursuance of this section for six months in the office at the mine, and shall produce the same to any inspector under this Act at all reasonable times when required by him during that period, and allow him to inspect and copy the same.

Every person who forges or counterfeits any certificate required by this section, or gives or signs any such certificate falsely, or wilfully makes use of any forged, counterfeit, or false certificate, shall be liable on conviction to imprisonment for a period not exceeding three months, with or without hard labour.

On application of teacher, employer to pay sum for schooling of boy and deduct it from wages.

9. The principal teacher of a school which is attended by any boy employed in a mine to which this Act applies, may apply in writing to the person who pays the wages of such boy to pay such sum as herein-after mentioned on account of any boy in respect of whom he may have duly granted a certificate in pursuance of this Act, and after the date of such application, such person, so long as he employs the boy, shall pay to the principal teacher of the said school, for every week that the boy attends that school, the weekly sum specified in the application, not exceeding twopence per week, and not exceeding one twelfth part of the wages of the boy, and may deduct the sum so paid by him from the wages payable for the services of such boy.

. Any person who after such application refuses to pay on demand any sum that may become due as afore-



said shall be liable to a penalty not exceeding ten A.D. 1872.  
shillings.

10. If an inspector under this Act is satisfied by Inspector may dis-qualify for granting certificates any teacher who is unfit. inspection of a school or otherwise that the principal teacher of a school who grants certificates of school attendance required under this Act ought to be disqualified for granting such certificates for any of the following reasons ; namely,

(1) Because he is unfit to instruct children by reason either of his ignorance or neglect, or of his not having the necessary books and materials :

(2) Because of his immoral conduct : or,

(3) Because of his continued neglect to fill up proper certificates of school attendance :

in any such case he may serve on the teacher a written notice stating the reason for such disqualification. At the expiration of two weeks from the date of such notice the teacher shall, subject to the appeal herein-after mentioned, be disqualified for granting certificates.

The inspector shall, so far as he can, serve on every employer of a child who obtains certificates from such teacher a notice to the like effect as the notice served on the teacher, and also specifying a school which the child employed by such employer can attend within two miles (measured according to the nearest road) from the place of employment or the residence of the child.

Any teacher who is disqualified as aforesaid, and any employer who obtains certificates from him, may within three weeks after the service of the notice on the teacher, appeal therefrom to the Education Department, who may confirm or reverse such disqualification.

A.D. 1872.

After a teacher is disqualified for granting certificates, no certificate given by him shall be deemed to be a certificate in compliance with this Act, unless in the case of there being no other school which the child employed in a mine can attend within two miles (measured according to the nearest road) from the mine or the residence of such child, or unless with the written consent of an inspector under this Act.

The inspectors under this Act shall in their reports to a Secretary of State report the name of every teacher disqualified under this section during the preceding twelve months, the name of the school at which he taught, and such last-mentioned report shall be communicated to the Committee of Council on Education.

Penalty for non-attendance of children at school.

11. The following regulation shall apply to every boy of ten and under twelve years of age, employed below ground in any mine to which this Act applies :

The parent, guardian, or person having the custody of or control over any such boy shall cause him to attend school in accordance with the regulations of this Act :

Every such parent, guardian, or person who wilfully fails to act in conformity with this section, shall be liable to a penalty of not more than twenty shillings for each offence.

As to employment of women, young persons, and children above ground in connexion with mines.

12. With respect to women, young persons, and children employed above ground, in connexion with any mine to which this Act applies, the following provisions shall have effect :

(1) No child under the age of ten years shall be so employed :

(2) The regulations of this Act with respect to boys

of ten and under twelve years of age shall A.D. 1872.  
apply to every child so employed :

- (3) The regulations of this Act with respect to male young persons under sixteen years of age shall apply to every woman and young person so employed :
- (4) No woman, young person, or child shall be so employed between the hours of nine at night and five on the following morning, or on Sunday, or after two o'clock on Saturday afternoon :
- (5) Intervals for meals shall be allowed to every woman, young person, and child so employed, amounting in the whole to not less than half an hour during each period of employment which exceeds five hours, and to not less than one hour and a half during each period of employment which exceeds eight hours.

The provisions of this clause as to the employment of women, young persons, and children after two o'clock on Saturday afternoon, shall not apply in the case of any mine in Ireland, so long as it is exempted in writing by a Secretary of State.

13. The owner, agent, or manager of every mine to which this Act applies shall keep in the office at the mine a register, and shall cause to be entered in such register the name, age, residence, and date of first employment of all boys under the age of twelve years, and of the age of twelve and under the age of thirteen years, and of all male young persons under the age of sixteen years who are employed in the mine below ground, and of all women, young persons, and children

Register to be kept by owner, &c., of boys and male young persons employed in mines.

A.D. 1872. employed above ground in connexion with the mine, and a memorandum of the certificates of the school attendance of such boys obtained in pursuance of this Act, and shall produce such register to any inspector under this Act at the mine at all reasonable times when required by him, and allow him to inspect and copy the same.

The immediate employer of every boy or male young person of the ages aforesaid, other than the owner, agent, or manager of the mine, before he causes such boy or male young person to be in any mine to which this Act applies below ground, shall report to the manager of such mine, or some person appointed by such manager, that he is about to employ him in such mine.

As to employment of young persons under 18 about engines.

14. Where there is a shaft or inclined plane or level in any mine to which this Act applies, whether for the purpose of an entrance to such mine or of a communication from one part to another part of such mine, and persons are taken up or down or along such shaft, plane, or level by means of any engine, windlass, or gin, driven or worked by steam or any mechanical power, or by an animal, or by manual labour, a person shall not be allowed to have charge of such engine, windlass, or gin, or of any part of the machinery, ropes, chains, or tackle connected therewith, unless he is a male of at least eighteen years of age.

Where the engine, windlass, or gin is worked by an animal, the person under whose direction the driver of the animal acts shall, for the purposes of this section, be deemed to be the person in charge of the engine, windlass, or gin, but such driver shall not be under twelve years of age.

15. If any person contravenes or fails to comply <sup>A.D. 1872.</sup> with, [or permits any person to contravene or fail <sup>Penalty for employment of persons in contravention of provisions of this Act.</sup> to comply with, any provision of this Act with respect to the employment of women, girls, young persons, boys, or children, or to the attendance of boys at school, or to the register of boys and male young persons, or of women, young persons, and children, or to the reporting the intended employment of boys or male young persons, or to the employment of persons about any engine, windlass, or gin, he shall be guilty of an offence against this Act; and in case of any such contravention or non-compliance by any person whomsoever, the owner, agent, and manager shall each be guilty of an offence against this Act, unless he prove that he had taken all reasonable means by publishing and to the best of his power enforcing the provisions of this Act to prevent such contravention or non-compliance.

If it appear that a child, boy, or young person, or a person employed about an engine, windlass, or gin, was employed on the representation of his parent or guardian that he was of that age at which his employment would not be in contravention of this Act, and under the belief in good faith that he was of that age, the owner, agent, or manager of the mine and employer shall be exempted from any penalty, and the parent or guardian shall, for such misrepresentation, be deemed guilty of an offence against this Act.

A.D. 1872.

*Wages.*

Prohibition  
of payment  
of wages at  
public-  
houses, &c.

16. No wages shall be paid to any person employed in or about any mine to which this Act applies at or within any public-house, beer shop, or place for the sale of any spirits, beer, wine, cyder, or other spirituous or fermented liquor, or other house of entertainment, or any office, garden, or place belonging or contiguous thereto, or occupied therewith.

Every person who contravenes or fails to comply with or permits any person to contravene or fail to comply with this section shall be guilty of an offence against this Act; and in the event of any such contravention or non-compliance by any person whomsoever, the owner, agent, and manager shall each be guilty of an offence against this Act, unless he prove that he had taken all reasonable means by publishing and to the best of his power enforcing the provisions of this section to prevent such contravention or non-compliance.

As to pay-  
ment of  
persons em-  
ployed in  
mines by  
weight.

17. Where the amount of wages paid to any of the persons employed in a mine to which this Act applies depends on the amount of mineral gotten by them, such persons shall, after the first day of August one thousand eight hundred and seventy-three, unless the mine is exempted by a Secretary of State, be paid according to the weight of the mineral gotten by them, and such mineral shall be truly weighed accordingly.

Provided always, that nothing herein contained shall preclude the owner, agent, or manager of the mine from agreeing with the persons employed in such mine that deductions shall be made in respect of stones or materials other than mineral contracted to be gotten,

which shall be sent out of the mine with the mineral A.D. 1872.  
contracted to be gotten, or in respect of any tubs, baskets, or hutches being improperly filled in those cases where they are filled by the getter of the mineral or his drawer, or by the person immediately employed by him, such deductions being determined by the banksman or weigher and check weigher (if there be one), or in case of difference by a third party to be mutually agreed on by the owner, agent, or manager of the mine on the one hand, and the persons employed in the mine on the other.

Where it is proved to the satisfaction of a Secretary of State that by reason of any exigencies existing in the case of any mine or class of mines to which the foregoing provision in this section applies, it is requisite or expedient that the persons employed in such mine or class of mines should not be paid by the weight of the mineral gotten by them, or that the beginning of such payment by weight should be postponed, such Secretary of State may, if he think fit, by order exempt such mine or class of mines from the provisions of this section, either without condition or during the time and upon the conditions specified in the order, or postpone in such mine or class of mines the beginning of such payment by weight, and may from time to time revoke or alter any such order.

If any person contravenes or fails to comply with, or permits any person to contravene or fail to comply with, this section, he shall be guilty of an offence against this Act; and in the event of any contravention of or non-compliance with this section by any person whomsoever, the owner, agent, and manager shall each be guilty of

A.D. 1872. an offence against this Act, unless he prove that he had taken all reasonable means by publishing and to the best of his power enforcing the provisions of this section to prevent such contravention and non-compliance.

Appoint-  
ment and  
removal of  
check  
weigher on  
part of men.

18. The persons who are employed in a mine to which this Act applies, and are paid according to the weight of the mineral gotten by them, may, at their own cost, station a person (in this Act referred to as "a check weigher") at the place appointed for the weighing of such mineral, in order to take an account of the weight thereof on behalf of the persons by whom he is so stationed. The check weigher shall be one of the persons employed either in the mine at which he is so stationed or in another mine belonging to the owner of that mine. He shall have every facility afforded to him to take a correct account of the weighing for the persons by whom he is so stationed; and if in any mine proper facilities are not afforded to the check weigher as required by this section, the owner, agent, and manager of such mine shall each be guilty of an offence against this Act, unless he prove that he had taken all reasonable means by enforcing to the best of his power the provisions of this section to prevent such contravention or non-compliance.

The check weigher shall not be authorised in any way to impede or interrupt the working of the mine, or to interfere with the weighing, but shall be authorised only to take such account as aforesaid, and the absence of the check weigher shall not be a reason for interrupting or delaying such weighing.

If the owner, agent, or manager of the mine desires



the removal of a check weigher on the ground that such check weigher has impeded or interrupted the working of the mine, or interfered with the weighing, or has otherwise misconducted himself, he may complain to any Court of summary jurisdiction, who, if of opinion that the owner, agent, or manager shows sufficient *prima facie* ground for the removal of such check weigher, shall call upon the check weigher to show cause against his removal. On the hearing of the case the Court shall hear the parties, and, if they think that at the hearing sufficient ground is shown by the owner, agent, or manager to justify the removal of the check weigher, shall make a summary order for his removal, and the check weigher shall thereupon be removed, but without prejudice to the stationing of another check weigher in his place.

The Court may in every case make such order as to the costs of the proceedings as they think just.

If in pursuance of any order of exemption made by a Secretary of State, the persons employed in a mine to which this Act applies are paid by the measure or gauge of the material gotten by them, the provisions of this section shall apply in like manner as if the term "weighing" included measuring and gauging, and the terms relating to weighing shall be construed accordingly.

*Notes to Sect. 18.*—In *Prentice v. Hall* (37 L. T. Rep. n. s. 605), a check weigher had been convicted and imprisoned for intimidating one of the workmen with a view to compel him to abstain from working as a waggon-rider in the same colliery. The owner of the colliery applied to justices for a summary order for

A.D. 1872. his removal, under the provisions of sect. 18, and the justices, although it did not so appear on the face of the conviction, admitted evidence to show, and found as a fact, that the intimidation took place on the mine-owner's premises, where the check weigher had no right to be, except in his capacity of check weigher. It did not appear that this intimidation caused any impediment or interruption of the working of the mine, but the justices made the order of removal. The Court of Queen's Bench Division held upon a case, stated that the appellant had misconducted himself within the meaning of the section, and that the justices were justified in making the order.

.Where the men employed in a mine appoint and pay a check weigher under the Coal Mines' Regulation Act, 1872, and are afterwards all discharged, the check weigher's office ceases. If the men are re-engaged with others, but nothing further is done with regard to the check weigher, he is not "stationed by the persons employed in the mine" within the meaning of the Act, and cannot maintain an action against the mine-owner for preventing him from acting after the re-engagement of the men. *Whitehead v. Holdsworth* (L. R. 4 Ex. D. 13; 48 L. J. Ex. 254; 39 L. T. 20, 638; 27 W. R. 94).

Application  
of Weights  
and Mea-  
sures Act to  
weights  
used in  
mines, &c.

19. The Weights and Measures Act, or any Act for the time being in force relating to weights and measures, shall apply to the weights used in any mine to which this Act applies for determining the wages payable to any person employed in such mine according to the weight of the mineral gotten by such

person, in like manner as it applies to weights used A.D. 1872.  
 for the sale of any article, and the inspector of weights  
 and measures for the district appointed under the said  
 Act shall accordingly from time to time, but without  
 unnecessarily impeding or interrupting the working of  
 the mine, inspect and examine, in manner directed by  
 the said Act, the weighing machines and weights used  
 for mines to which this Act applies, or the measures or  
 gauges used for such mines: Provided that nothing  
 in this section shall prevent the use of the measures  
 and gauges ordinarily used in such mine.

The term “Weights and Measures Act” in this  
 section means :

- (a) As to Great Britain, the Act of the session of  
 the fifth and sixth years of the reign of  
 King William the Fourth, chapter sixty-  
 three, “to repeal an Act of the fourth and  
 fifth year of His present Majesty relating to  
 weights and measures, and to make other  
 provisions instead thereof;” and,
- (b) As to Ireland, the Weights and Measures  
 (Ireland) Amendment Act, 1862, as amended  
 by the Act of the session of the thirtieth and  
 thirty-first years of the reign of Her present  
 Majesty, chapter ninety-four, “to provide  
 for the inspection of weights and measures,  
 and to regulate the law relating thereto in  
 certain parts of the police district of Dublin  
 Metropolis.”

A.D. 1872.

*Single Shafts.*

Prohibition  
of single  
shafts.

20. After the commencement of this Act, the owner, agent, or manager of a mine to which this Act applies shall not employ any person in such mine, or permit any person to be in such mine for the purpose of employment therein, unless there are in communication with every seam of such mine for the first time being at work at least two shafts or outlets, separated by natural strata of not less than ten feet in breadth, by which shafts or outlets distinct means of ingress and egress are available to the persons employed in such seam, whether such two shafts or outlets belong to the same mine, or one or more of them belong to another mine, and unless there is a communication of not less than four feet wide and three feet high between such two shafts or outlets, and unless there is at each of such two shafts or outlets or upon the works belonging to the mine and either in actual use or available for use within a reasonable time proper apparatus for raising and lowering persons at each such shaft or outlet.

Provided that such separation shall not be deemed incomplete by reason only that openings through the strata between the two shafts or outlets have been made for temporary purposes of ventilation, drainage, or otherwise; or in the case of mines where inflammable gas has not been found within the preceding twelve months for the same purposes although not temporary.

Every owner, agent, and manager of a mine who

acts in contravention of or fails to comply with this A.D. 1872.  
 section shall be guilty of an offence against this Act.

Any of Her Majesty's superior Courts of Law or Equity, whether any other proceedings have or have not been taken, may, upon the application of the Attorney General, prohibit by injunction the working of any mine in which any person is employed, or is permitted to be for the purpose of employment, in contravention of this section, and may award such costs in the matter of the injunction as the Court thinks just; but this provision shall be without prejudice to any other remedy permitted by law for enforcing the provisions of this Act.

Written notice of the intention to apply for such injunction in respect of any mine shall be given to the owner, agent, or manager of such mine not less than ten days before the application is made.

21. No person shall be precluded by any agreement from doing such acts as may be necessary for providing a second shaft or outlet to a mine, where the same is required by this Act, or be liable under any contract to any penalty or forfeiture for doing such acts as may be necessary in order to comply with the provisions of this Act with respect to shafts or outlets.

22. The provisions of this Act with respect to shafts or outlets shall not apply in the following cases; that is to say:

- (1) In the case either of opening a new mine for the purpose of searching for or proving minerals, or of any working for the purpose of making a communication between two or more shafts, so long as not more than twenty

Agreements  
in contra-  
vention of  
this Act  
illegal.

Exceptions  
from provi-  
sions as to  
single  
shafts.

A.D. 1872.

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persons are employed below ground at any one time in the whole of the different seams in connexion with each shaft or outlet in such new mine or such working :

(2) In the case of any proved mine so long as it is exempted in writing by a Secretary of State on the ground either—

(a) that the quantity of mineral proved is not sufficient to repay the outlay which would be occasioned by the sinking or making of a second shaft or outlet, or

(b) if the mine is not a coal mine, or mine with inflammable gas, that sufficient provision has been made against danger from other causes than explosions of gas by using stone, brick, or iron in the place of wood for the lining of the shaft and the construction of the mid wall ; or

(c) that the workings in any seam of a mine have reached the boundary of the property or other extremity of the mineral field of which such seam is a part, and that it is expedient to work away the pillars already formed in course of the ordinary working, notwithstanding that one of the shafts or outlets may be cut off by so working away the pillars of such seam ; and so long

as there are not employed below ground A.D. 1872.  
 at any one time in the whole of the different  
 seams in connexion with the shaft or outlet  
 in any such mine, more than twenty persons,  
 or (if the mine is not a coal mine, or mine with  
 inflammable gas) than such larger number of  
 persons as may for the time being be allowed  
 by a Secretary of State :

- (3) In the case of any mine one of the shafts or  
 outlets of which has become, by reason of  
 some accident, unavailable for the use of the  
 persons employed in the mine, so long as  
 such mine is exempted in writing by a  
 Secretary of State, and as the conditions on  
 which such exemption is granted are duly  
 observed.

23. The provisions of this Act with respect to shafts  
 or outlets shall not, until the first day of January one  
 thousand eight hundred and seventy-five, apply to any  
 mine which is not at the passing of this Act required to  
 have two shafts or outlets. Temporary  
 exception  
 from provi-  
 sions as to  
 single  
 shafts.

24. If a written representation is made to a Secretary  
 of State by the owner or agent of a mine not required  
 at the passing of this Act to have two shafts or outlets,  
 either— Exemption  
 of certain  
 mines as to  
 shafts, and  
 extension of  
 time for  
 other mines.

- (1) Within six months after the commencement of  
 this Act, alleging that by reason of the mine  
 being nearly exhausted he ought to be ex-  
 empted from the obligation of providing an  
 additional shaft or outlet in pursuance of  
 this Act ; or,

- (2) Within six months immediately preceding the

A.D. 1872.

first day of January one thousand eight hundred and seventy-five, alleging that an extension of time for providing an additional shaft or outlet ought to be granted to him :

the question as to whether such exemption or extension of time ought to be granted shall be referred to arbitration, and the date of the receipt of such representation by a Secretary of State shall be deemed to be the date of the reference, and the award made upon such arbitration may exempt the owner of such mine from the obligation of providing an additional shaft or outlet, and may grant to the owner of such other mine as aforesaid such extension of time as may be specified by the award, but if the result of the arbitration is against the owner or agent, or if no award is made by reason of any default or neglect on the part of the owner or agent, the owner or agent shall be bound by the provisions of this Act as if this section had not been enacted.

*Division of Mine into Parts.*

Division of  
mine into  
parts.

25. Where two or more parts of a mine are worked separately the owner or agent of such mine may give notice in writing to that effect to the inspector of the district, and thereupon each such part shall, for all the purposes of this Act, be deemed to be a separate mine.

If a Secretary of State is of opinion that the division of a mine in pursuance of this section tends to lead to the evasion of the provisions of this Act, or otherwise to prevent the carrying of this Act into effect, he may object to such division by notice served on the owner or agent of the mine ; and such owner or agent, if he



decline to acquiesce in such objection, may, within A.D. 1872.  
twenty days after the receipt of such notice send a notice  
to the inspector of the district stating that he declines so  
to acquiesce, and thereupon the matter shall be deter-  
mined by arbitration in manner provided by this Act ;  
and the date of the receipt of the last-mentioned notice  
shall be deemed to be the date of the reference.

*Certificated Managers.*

26. Every mine to which this Act applies shall be Appoint-  
ment of  
manager to  
mine.  
under the control and daily supervision of a manager,  
and the owner or agent of every such mine shall nomi-  
nate himself or some other person (not being a con-  
tractor for getting the mineral in such mine, or a  
person in the employ of such contractor) to be the  
manager of such mine, and shall send written notice to  
the inspector of the district of the name and address of  
such manager.

A person shall not be qualified to be a manager of  
a mine to which this Act applies unless he is for the  
time being registered as the holder of a certificate under  
this Act.

If any mine to which this Act applies is worked for  
more than fourteen days without there being such a  
manager for that mine as is required by this section,  
the owner and agent of such mine shall each be liable  
to a penalty not exceeding fifty pounds, and to a further  
penalty not exceeding ten pounds for every day during  
which such mine is so worked.

Provided that—

(a) The owner of such mine shall not be liable to

A.D. 1872

any such penalty if he prove that he had taken all reasonable means by the enforcement of this section to prevent the mine being worked in contravention of this section :

- (b) If for any reasonable cause there is for the time being no manager of a mine qualified as required by this section, the owner or agent of such mine may appoint any competent person not holding a certificate under this Act to be manager, for a period not exceeding two months, or such longer period as may elapse before such person has an opportunity of obtaining by examination a certificate under this Act, and shall send to the inspector of the district a written notice of the name and address of such manager, and of the reason of his appointment ; and
- (c) A mine in which less than thirty persons are ordinarily employed below ground, or of which the average daily out-put does not exceed twenty-five tons, shall be exempt from the provisions of this section, unless the inspector of the district, by notice in writing served on the owner or agent of such mine, requires the same to be under the control of a manager.

*Note to Sect. 26.*—"In the opinion of Mr. Bruce, the person under 'whose control and daily supervision' the 'mine,' as defined by the Act, may most properly be said to be, is the viewer or under-viewer, and not the under-looker or over-ground overman."—(Home Sec. Circ., 28th Nov., 1872.)

27. For the purpose of granting in any part of the

United Kingdom, to be from time to time defined by A.D. 1872.  
 an order in writing made by a Secretary of State, cer-  
 tificates of competency to managers of mines for the examiners  
for granting  
certificates  
of compe-  
tency to  
managers.  
 purposes of this Act, examiners shall be appointed by  
 a board constituted as herein-after mentioned.

A Secretary of State may from time to time appoint, remove, and re-appoint fit persons to form such board as follows ; namely, three persons being owners of mines to which this Act applies in the said part of the United Kingdom, and three persons employed in or about a mine to which this Act applies in the said part of the United Kingdom, not being owners, agents, or managers of a mine, and three persons practising as mining engineers, agents, or managers of mines, or coal viewers in the said part of the United Kingdom, and one inspector under this Act : the persons so appointed shall during the pleasure of the Secretary of State form the board for the purposes of the said examinations in the said part of the United Kingdom.

28. The proceedings of the board shall be in ac-  
 cordance with the rules contained in Schedule Two to Constitu-  
tion and  
powers of  
board for  
appointing  
examiners.  
 this Act ; the board shall from time to time appoint  
 examiners, not being members of the board, except  
 with the consent of the Secretary of State, to conduct  
 the examinations in the part of the United Kingdom  
 for which such board acts, of applicants for certificates  
 of competency under this Act, and may from time  
 to time make, alter, and revoke rules as to the conduct  
 of such examinations and the qualifications of the ap-  
 plicants, so, however, that in every such examination  
 regard shall be had to such knowledge as is necessary  
 for the practical working of mines in the said part

A.D. 1872. of the United Kingdom ; every such board shall make from time to time to a Secretary of State a report and return of their proceedings, and of such other matters as a Secretary of State may from time to time require.

Regulations  
by Secretary  
of State as  
to examina-  
tions.

29. A Secretary of State may from time to time make, alter, and revoke rules as to the places and times of examinations of applicants for certificates of competency under this Act, the number and remuneration of the examiners, and the fees to be paid by the applicants, so that the fees do not exceed those specified in Schedule One to this Act. Every such rule shall be duly observed by every board appointed under this Act to whom it applies.

Grant of  
certificates  
to appli-  
cants on  
passing ex-  
aminations.

30. A Secretary of State shall deliver to every applicant who is duly reported by the examiners to have passed the examination satisfactorily, and to have given satisfactory evidence of his sobriety, experience, ability, and general good conduct, such a certificate of competency as the case requires. The certificate shall be in such form as a Secretary of State from time to time directs, and a register of the holders of such certificates shall be kept by such person and in such manner as a Secretary of State from time to time directs.

Grant of  
certificates  
of service to  
existing  
managers.

31. Certificates of service for the purposes of this Act shall be granted by a Secretary of State to every person who satisfies him either that before the passing of this Act he was acting, and has since that day acted, or that he has at any time within five years before the passing of this Act for a period of not less than twelve months acted, in the capacity of a manager of a mine or such part of a mine as can under this Act be made a separate mine for the purposes of this Act.

A.D. 1872.

Every such certificate of service shall contain particulars of the name, place, and time of birth, and the length and nature of the previous service of the person to whom the same is delivered, and a certificate of service may be refused to any person who fails to give a full and satisfactory account of the particulars aforesaid, or to pay such registration fee as a Secretary of State may direct, not exceeding that mentioned in Schedule One to this Act.

A certificate of service shall have the same effect for the purposes of this Act as a certificate of competency granted under this Act.

32. If at any time representation is made to a Secretary of State by an inspector or otherwise, that any manager holding a certificate under this Act is by reason of incompetency or gross negligence unfit to discharge his duties, or has been convicted of an offence against this Act, the Secretary of State may, if he think fit, cause inquiry to be made into the conduct of such manager, and with respect to such inquiry the following provisions shall have effect :

Inquiry into competency of manager, and cancellation of certificate in case of unfitness.

(1) The inquiry shall be public, and shall be held at such a place as the Secretary of State may appoint by such County Court judge, metropolitan police magistrate, stipendiary magistrate, or other person or persons, as may be directed by the Secretary of State, and either alone or with the assistance of any assessor or assessors named by the Secretary of State :

(2) The Secretary of State shall, before the commencement of the inquiry, furnish to the

A.D. 1872.

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manager a statement of the case upon which the inquiry is instituted :

- (3) Some person appointed by the Secretary of State shall undertake the management of the case :
- (4) The manager may attend the inquiry by himself, his counsel, attorney, or agent, and may, if he think fit, be sworn and examined as an ordinary witness in the case :
- (5) The persons appointed to hold the inquiry, in this Act referred to as the Court, shall, upon the conclusion of the inquiry, send to the Secretary of State a report containing a full statement of the case, and their opinion thereon, and such report of, or extracts from the evidence, as the Court think fit :
- (6) The Court shall have power to cancel or suspend the certificate of the manager, if they find that he is by reason of incompetency or gross negligence, or of his having been convicted of an offence against this Act, unfit to discharge his duty :
- (7) The Court may, if they think fit, require a manager to deliver up his certificate, and if any manager fail, without sufficient cause to the satisfaction of the Court, to comply with such requisition, he shall be liable to a penalty not exceeding one hundred pounds. The Court shall hold a certificate so delivered until the conclusion of the investigation, and shall then either restore, cancel, or suspend the same, according to their judgment on the case :

(8) The Court shall have for the purpose of the <sup>A.D. 1872.</sup>  
inquiry, all the powers of a Court of summary  
jurisdiction, and all the powers of an in-  
spector under this Act :

(9) The Court may also, by summons under their  
hands, require the attendance of all such  
persons as they think fit to call before them  
and examine for the purpose of the inquiry,  
and every person so summoned shall be  
allowed such expenses as would be allowed  
to a witness attending on subpoena before a  
Court of record ; and in case of dispute as to  
the amount to be allowed, the same shall be  
referred by the Court to a master of one of  
the superior Courts, who, on request under  
the hands of the members of the Court, shall  
ascertain and certify the proper amount of  
such expenses.

33. The Court may make such order as they think <sup>As to costs</sup>  
fit respecting the costs and expenses of the inquiry, <sup>and ex-</sup>  
and such order shall, on the application of any party <sup>penses of</sup>  
entitled to the benefit of the same, be enforced by any <sup>inquiry.</sup>  
Court of summary jurisdiction as if such costs and  
expenses were a penalty imposed by such Court.

The Secretary of State may, if he think fit, pay to  
the members of the Court of inquiry, including any  
assessors, such remuneration as he may with the  
consent of the Treasury appoint.

Any costs and expenses ordered by the Court to be  
paid by a Secretary of State, and any remuneration  
paid under this section, shall be paid out of moneys  
provided by Parliament.

A.D. 1872.

Cancellation of certificate to be recorded, but restoration thereof may be had through Secretary of State in certain cases.

34. Where a certificate of a manager is cancelled or suspended in pursuance of this Act, a Secretary of State shall cause such cancellation or suspension to be recorded in the register of holders of certificates.

A Secretary of State may at any time, if it is shown to him to be just so to do, renew or restore, on such terms as he think fit, any certificate which has been cancelled or suspended in pursuance of this Act.

Copy of certificate may be obtained in case of loss.

35. Whenever any person proves to the satisfaction of a Secretary of State that he has, without fault on his part, lost, or been deprived of any certificate previously granted to him under this Act, such Secretary of State shall, upon payment of such fee, if any, as he may direct, but not exceeding the fee specified in Schedule One to this Act, cause a copy of the certificate to which the applicant appears by the register to be entitled, to be made out and certified by the person who keeps the register, and delivered to the applicant, and any copy which purports to be so made and certified as aforesaid shall have all the effect of the original certificate.

Expenses and fees, how to be defrayed.

36. All expenses incurred by a Secretary of State with the concurrence of the Commissioners of Her Majesty's Treasury in carrying into effect the provisions of this Act with respect to certificates of competency or service shall be defrayed out of moneys provided by Parliament.

All fees payable by the applicants for examination for or for a copy of a certificate under this Act shall be paid into the receipt of Her Majesty's Exchequer in such manner as the Treasury may from time to time direct, and be carried to the Consolidated Fund.



37. Every person who commits any of the following offences ; that is to say, A.D. 1872.  
Penalty for  
forgery of a  
false declaration as to  
certificate.

(1) Forges, or counterfeits, or knowingly makes any false statement in any certificate of competency or service under this Act, or any official copy of such certificate ; or

(2) Knowingly utters or uses any such certificate or copy which has been forged or counterfeited or contains any false statement ; or

(3) For the purpose of obtaining, for himself or any other person, employment as a certificated manager, or the grant, renewal, or restoration of any certificate under this Act, or a copy thereof, either,

(a) makes or gives any declaration, representation, statement, or evidence which is false in any particular ; or

(b) knowingly utters, produces, or makes use of any such declaration, representation, statement, or evidence, or any document containing the same,

shall be guilty of a misdemeanour, and be liable on conviction to imprisonment for a term not exceeding two years, with or without hard labour.

### *Returns, Notices, and Abandonment.*

38. On or before the first day of February in every year the owner, agent, or manager of every mine to which this Act applies shall send to the inspector of the district on behalf of a Secretary of State a correct return, specifying, with respect to the year ending Returns by  
owners,  
agents, or  
managers of  
mine.

A.D. 1872. on the preceding thirty-first day of December, the quantity of coal or other mineral wrought in such mine, and the number of persons ordinarily employed in or about such mine below ground and above ground, distinguishing the persons employed below ground and above ground, and the different classes and ages of the persons so employed whose hours of labour are regulated by this Act.

The return shall be in such form as may be from time to time prescribed by a Secretary of State, and the inspector of the district on behalf of a Secretary of State shall from time to time on application furnish forms for the purpose of such return.

The Secretary of State may publish the aggregate results of such returns with respect to any particular county or inspector's district, or any large portion of a county or inspector's district, but the individual return shall not be published without the consent of the person making the same, or of the owner of the mine to which they relate, and no person except an inspector or Secretary of State shall be entitled, without such consent, to see the same.

Every owner, agent, or manager of a mine who fails to comply with this section, or makes any return which is to his knowledge false in any particular, shall be guilty of an offence against this Act.

Notice to be given of accidents in mines. 39. Where in or about any mine to which this Act applies, whether above or below ground, either

- (1) loss of life or any personal injury to any person employed in or about the mine occurs by reason of any explosion of gas, powder, or of any steam boiler ; or

- (2) loss of life or any serious personal injury to any A.D. 1872.  
 person employed in or about the mine occurs  
 by reason of any accident whatever,

the owner, agent, or manager of the mine shall, within twenty-four hours next after the explosion or accident, send notice in writing of the explosion or accident, and of the loss of life or personal injury occasioned thereby, to the inspector of the district on behalf of a Secretary of State, and shall specify in such notice the character of the explosion or accident, and the number of persons killed and injured respectively.

Where any personal injury, of which notice is required to be sent under this section, results in the death of the person injured, notice in writing of the death shall be sent to the inspector of the district on behalf of the Secretary of State within twenty-four hours after such death comes to the knowledge of the owner, agent, or manager.

Every owner, agent, or manager who fails to act in compliance with this section shall be guilty of an offence against this Act.

40. In any of the following cases, namely,

- (1) Where any working is commenced for the purpose of opening a new shaft for any mine to which this Act applies ;
- (2) Where a shaft of any mine to which this Act applies is abandoned or the working thereof discontinued ;
- (3) Where the working of a shaft of any mine to which this Act applies is recommenced after any abandonment or discontinuance for a period exceeding two months ; or

Notice to be given of opening and abandonment of mine.

A.D. 1872.

- (4) Where any change occurs in the name of, or in the name of the owner, agent, or manager of, any mine to which this Act applies, or in the officers of any incorporated company which is the owner of a mine to which this Act applies,

the owner, agent, or manager of such mine shall give notice thereof to the inspector of the district within two months after such commencement, abandonment, discontinuance, recommencement, or change, and if such notice is not given the owner, agent, or manager shall be guilty of an offence against this Act.

Fencing of  
abandoned  
mine.

41. Where any mine to which this Act applies is abandoned or the working thereof discontinued, at whatever time such abandonment or discontinuance occurred, the owner thereof, and every other person interested in the minerals of such mine, shall cause the top of the shaft and any side entrance from the surface to be and to be kept securely fenced for the prevention of accidents :

Provided that—

- (1) Subject to any contract to the contrary, the owner of the mine shall, as between him and any other person interested in the minerals of the mine, be liable to carry into effect this section, and to pay any costs incurred by any other person interested in the minerals of the mine in carrying this section into effect :
- (2) Nothing in this section shall exempt any person from any liability under any other Act, or otherwise.

If any person fail to act in conformity with this section, he shall be guilty of an offence against this Act. A.D. 1872.

Any shaft or side entrance which is not fenced as required by this section, and is within fifty yards of any highway, road, footpath, or place of public resort, or is in open or uninclosed land, shall be deemed to be a nuisance within the meaning of section eight of the Nuisances Removal Act for England, 1855, as amended and extended by the Sanitary Act, 1866.

42. Where any mine to which this Act applies is abandoned, the owner of such mine at the time of such abandonment shall, within three months after such abandonment, send to a Secretary of State an accurate plan on a scale of not less than a scale of two chains to one inch, or on such other scale as the plan used in the mine at the time of such abandonment is constructed on, showing the boundaries of the workings of such mine up to the time of the abandonment, with the view of its being preserved under the care of the Secretary of State, but no person, except an inspector under this Act, shall be entitled, without the consent of the owner of the mine, to see such plan when so sent until after the lapse of ten years from the time of such abandonment. Plans of abandoned mines to be sent to Secretary of State.

Every person who fails to comply with this section shall be guilty of an offence against this Act.

### *Inspection.*

43. A Secretary of State may from time to time appoint any fit persons to be inspectors of mines to Appoint-ment of in-spectors of mines.

A.D. 1872. which this Act applies, and assign them their duties, and may award them such salaries as the Commissioners of Her Majesty's Treasury may approve, and may remove such inspectors.

Notice of the appointment of every such inspector shall be published in the London Gazette.

Any such inspector is referred to in this Act as an inspector, and the inspector of a district means the inspector who is for the time being assigned to the district or portion of the United Kingdom with reference to which the term is used.

Any person appointed or acting as inspector under the Metalliferous Mines Regulation Act, 1872, if directed by a Secretary of State to act as an inspector under this Act, may so act, and shall be deemed to be an inspector under this Act.

Disqualifi-  
cation of  
persons as  
inspectors.

44. Any person who practises or acts or is a partner of any person who practises or acts as a land agent or mining engineer, or as a manager, viewer, agent, or valuer of mines, or arbitrator in any difference arising between owners, agents, or managers of mines, or is otherwise employed in or about any mine (whether such mine is one to which this Act applies or not), shall not act as an inspector of mines under this Act.

Powers of  
inspectors.

45. An inspector under this Act shall have power to do all or any of the following things ; namely,

- (1) To make such examination and inquiry as may be necessary to ascertain whether the provisions of this Act relating to matters above ground or below ground are complied with in the case of any mine to which this Act applies :

- (2) To enter, inspect, and examine any mine to which this Act applies, and every part thereof, at all reasonable times by day and night, but so as not to impede or obstruct the working of the said mine : A.D. 1872.
- (3) To examine into and make inquiry respecting the state and condition of any mine to which this Act applies, or any part thereof, and the ventilation of the mine, and the sufficiency of the special rules for the time being in force in the mine, and all matters and things connected with or relating to the safety of the persons employed in or about the mine or any mine contiguous thereto :
- (4) To exercise such other powers as may be necessary for carrying this Act into effect.

Every person who wilfully obstructs any inspector in the execution of his duty under this Act, and every owner, agent, and manager of a mine who refuses or neglects to furnish to the inspector the means necessary for making any entry, inspection, examination, or inquiry under this Act, in relation to such mine, shall be guilty of an offence against this Act.

46. If in any respect (which is not provided against by any express provision of this Act, or by any special rule) any inspector find any mine to which this Act applies, or any part thereof, or any matter, thing, or practice in or connected with any such mine, to be dangerous or defective, so as in his opinion to threaten or tend to the bodily injury of any person, such inspector may give notice in writing thereof to the owner, agent, or manager of the mine,

Notice by inspectors of causes of danger not provided for by the rules.

A.D. 1872. and shall state in such notice the particulars in which he considers such mine, or any part thereof, or any matter, thing, or practice, to be dangerous or defective, and require the same to be remedied ; and unless the same be forthwith remedied the inspector shall also report the same to a Secretary of State.

If the owner, agent, or manager of the mine objects to remedy the matter complained of in the notice he may, within twenty days after the receipt of such notice, send his objection in writing, stating the grounds thereof, to a Secretary of State ; and thereupon the matter shall be determined by arbitration in manner provided by this Act ; and the date of the receipt of such objection shall be deemed to be the date of the reference.

If the owner, agent, or manager fail to comply either with the requisition of the notice, where no objection is sent within the time aforesaid, or with the award made on arbitration, within twenty days after the expiration of the time for objection or the time of making of the award (as the case may be), he shall be guilty of an offence against this Act, and the notice and award shall respectively be deemed to be written notice of such offence.

Provided that the Court, if satisfied that the owner, agent, or manager has taken active measures for complying with the notice or award, but has not, with reasonable diligence, been able to complete the works, may adjourn any proceedings taken before them for punishing such offence, and, if the works are completed within a reasonable time, no penalty shall be inflicted.



No person shall be precluded by any agreement from A.D. 1872. doing such acts as may be necessary to comply with the provisions of this section, or be liable under any contract to any penalty or forfeiture for doing such acts.

*Note to Sects. 46 and 51.*—Sect. 46 of the Coal Mines Regulation Act, 1872, applies only to cases where the remedy is within the owner's power. So where the inspector of mines served a notice under the section upon the owner of a colliery, which was in danger of being flooded by the accumulation of water in an adjacent disused pit belonging to a different owner, calling upon him to remedy it; and he attempted to do so, but found it impossible without going on his neighbour's property, and, therefore, failed to comply with the notice and did not remove his men from his own workings; it was held (Cockburn, C. J., and Mellor, J.; Lush, J., dissenting) that he had been wrongly convicted of an offence under sect. 46, and that he was not bound to withdraw his men in consequence of the notice, their withdrawal being provided for under sect. 51, sub-section 6 (*Reg. v. Spon Lane Colliery Company* (L. R. 3 Q. B. D. 673; 27 W. R. 46; S. C. nom.). *Spon Lane Colliery Company v. Baker* (48 L. J. M. C. 24; 39 L. T. n. s. 13).

Lush, J., dissenting, said: "The conclusion which I come to is that the jurisdiction of the inspector to give this notice where danger exists in a mine from the proximity of water in another mine, as in the case before us, is not excluded by the 6th sub-section of sect. 51. . . . Though sect. 46 contemplates un-

A.D. 1872. doubtedly matters that are capable of being remedied by the mine-owner, nevertheless the mine-owner may commit an offence against this Act by not taking notice to appear within twenty days, and stating the grounds of his objection, so that the Secretary of State may determine whether he has or has not the means to comply with that Act.”

Plans of  
mines to be  
kept by  
owner, &c.

47. The owner, agent, or manager of every mine to which this Act applies shall keep in the office at the mine an accurate plan of the workings of such mine, and showing the workings up to at least six months previously.

The owner, agent, or manager of the mine shall produce to an inspector under this Act at the mine, such plan, and shall, if requested by the inspector, mark on such plan the progress of the workings of the mine up to the time of such production, and shall allow the inspector to examine the same; but the inspector is not hereby authorised to make a copy of any part of such plan.

If the owner, agent, or manager of any mine to which this Act applies fails to keep such plan as is prescribed by this section, or wilfully refuses to produce or allow to be examined such plan, or wilfully withholds any portion of any plan, or conceals any part of the workings of his mine, or produces an imperfect or inaccurate plan, unless he shows that he was ignorant of such concealment, imperfection, or inaccuracy, he shall be guilty of an offence against this Act; and, further, the inspector may, by notice in writing (whether a penalty for such offence has or has not been inflicted), require the owner, agent, or manager to

cause an accurate plan, such as is prescribed by this section, to be made within a reasonable time, at the expense of the owner of the mine, on a scale of not less than a scale of two chains to one inch, or on such other scale as the plan then used in the mine is constructed on. A.D. 1872.

If the owner, agent, or manager fail within twenty days, or such further time as may be shown to be necessary, after the requisition of the inspector to make or cause to be made such plan, he shall be guilty of an offence against this Act.

48. Every inspector under this Act shall make an annual report of his proceedings during the preceding year to a Secretary of State, which report shall be laid before both Houses of Parliament. Inspector to make an annual report, and special reports as directed.

A Secretary of State may at any time direct an inspector to make a special report with respect to any accident in a mine to which this Act applies, which accident has caused loss of life or personal injury to any person, and in such case shall cause such report to be made public at such time and in such manner as he thinks expedient.

### *Arbitration.*

49. With respect to arbitrations under this Act, the following provisions shall have effect : Provisions as to arbitrations.

- (1) The parties to the arbitration are in this section deemed to be the owner, agent, or manager of the mine on the one hand, and the inspector of mines (on behalf of the Secretary of State) on the other :

A.D. 1872.

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- (2) Each of the parties to the arbitration may, within twenty-one days after the date of the reference, appoint an arbitrator :
- (3) No person shall act as arbitrator or umpire under this Act who is employed in or in the management of, or is interested in the mine to which the arbitration relates :
- (4) The appointment of an arbitrator under this section shall be in writing, and notice of the appointment shall be forthwith sent to the other party to the arbitration, and shall not be revoked without the consent of such other party :
- (5) The death, removal, or other change in any of the parties to the arbitration shall not affect the proceedings under this section :
- (6) If within the said twenty-one days either of the parties fail to appoint an arbitrator, the arbitrator appointed by the other party may proceed to hear and determine the matter in difference, and in such case the award of the single arbitrator shall be final :
- (7) If before an award has been made any arbitrator appointed by either party die or become incapable to act, or for fourteen days refuse or neglect to act, the party by whom such arbitrator was appointed may appoint some other person to act in his place ; and if he fail to do so within fourteen days after notice in writing from the other party for that purpose, the remaining arbitrator may proceed to hear and determine the matters in dif-

ference, and in such case the award of such A.D. 1872.  
single arbitrator shall be final :

- (8) In either of the foregoing cases where an arbitrator is empowered to act singly, upon one of the parties failing to appoint, the party so failing may, before the single arbitrator has actually proceeded in the arbitration, appoint an arbitrator, who shall then act as if no failure had been made :
- (9) If the arbitrators fail to make their award within twenty-one days after the day on which the last of them was appointed, or within such extended time (if any) as may have been appointed for that purpose by both arbitrators under their hands, the matter in difference shall be determined by the umpire appointed as herein-after mentioned :
- (10) The arbitrators, before they enter upon the matters referred to them, shall appoint by writing under their hands an umpire to decide on points on which they may differ :
- (11) If the umpire die or become incapable to act before he has made his award, or refuses to make his award within a reasonable time after the matter has been brought within his cognizance, the persons or person who appointed such umpire shall forthwith appoint another umpire in his place :
- (12) If the arbitrators refuse or fail or for seven days after the request of either party neglect to appoint an umpire, then on the application of either party an umpire shall be appointed

A.D. 1872.

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by the chairman of the general or quarter sessions of the peace, within the jurisdiction of which the mine is situate :

- (13) The decision of every umpire on the matters referred to him shall be final :
- (14) If a single arbitrator fail to make his award within twenty-one days after the day on which he was appointed, the party who appointed him may appoint another arbitrator to act in his place :
- (15) The arbitrators and their umpire or any of them may examine the parties and their witnesses on oath, they may also consult any counsel, engineer, or scientific person whom they may think it expedient to consult :
- (16) The payment (if any) to be made to any arbitrator or umpire for his services shall be fixed by the Secretary of State, and together with the costs of the arbitration and award shall be paid by the parties or one of them according as the award may direct. Such costs may be taxed by a master of one of the superior Courts, who, on the written application of either of the parties, shall ascertain and certify the proper amount of such costs. The amount if any payable by the Secretary of State shall be paid as part of the expenses of inspectors under this Act. The amount if any payable by the owner, agent, or manager may in the event of non-payment be recovered in the same manner as penalties under this Act :

- (17) Every person who is appointed arbitrator or umpire under this section shall be a practical mining engineer, or a person accustomed to the working of mines, but when an award has been made under this section the arbitrator or umpire who made the same shall be deemed to have been duly qualified as provided by this section. A.D. 1872.

*Coroners.*

50. With respect to coroners' inquests on the bodies of persons whose deaths may have been caused by explosions or accidents in mines to which this Act applies, the following provisions shall have effect: Provisions as to coroners' inquests on deaths from accidents in mines.

- (1) Where a coroner holds an inquest upon a body of any person whose death may have been caused by any explosion or accident, of which notice is required by this Act to be given to the inspector of the district, the coroner shall adjourn such inquest unless an inspector, or some person on behalf of a Secretary of State, is present to watch the proceedings:
- (2) The coroner, at least four days before holding the adjourned inquest, shall send to the inspector for the district notice in writing of the time and place of holding the adjourned inquest:
- (3) The coroner, before the adjournment, may take evidence to identify the body, and may order the interment thereof:
- (4) If an explosion or accident has not occasioned the death of more than one person, and the

A.D. 1872.

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coroner has sent to the inspector of the district notice of the time and place of holding the inquest not less than forty-eight hours before the time of holding the same, it shall not be imperative on him to adjourn such inquest in pursuance of this section, if the majority of the jury think it unnecessary so to adjourn :

- (5) An inspector shall be at liberty at any such inquest to examine any witness, subject nevertheless to the order of the coroner :
- (6) Where evidence is given at an inquest at which an inspector is not present of any neglect as having caused or contributed to the explosion or accident, or of any defect in or about the mine appearing to the coroner or jury to require a remedy, the coroner shall send to the inspector of the district notice in writing of such neglect or default :
- (7) Any person having a personal interest in or employed in or in the management of the mine in which the explosion or accident occurred shall not be qualified to serve on the jury empannelled on the inquest; and it shall be the duty of the constable or other officer not to summon any person disqualified under this provision, and it shall be the duty of the coroner not to allow any such person to be sworn or to sit on the jury.

Every person who fails to comply with the provisions of this section shall be guilty of an offence against this Act.



A.D. 1872.  

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## PART II.

## RULES.

*General Rules.—Notes to Sect. 51, Rule 1.*

51. The following general rules shall be observed, so far as is reasonably practicable, in every mine to which this Act applies : General rules :

(1) An adequate amount of ventilation shall be constantly produced in every mine, to dilute and render harmless noxious gases to such an extent that the working places of the shafts, levels, stables, and workings of such mine, and the travelling roads to and from such working places, shall be in a fit state for working and passing therein. Ventilation.

*Notes to Sect. 51, Rule 1.*—In *Brough v. Homfray* (L. R. 3 Q. B. 771), decided upon the corresponding section of the repealed Act 23 & 24 Viet. c. cli. s. 10, r. 1, the Court held that it is not enough to ventilate the working places and travelling roads, but the intention of the rule is “that the mine or at least so much of it as is sufficiently contiguous to a working place as that it may operate upon a working place should be kept ventilated.”

A certified manager of a colliery at a salary of £1 a week was charged with an offence under rule 1 of this section. It was proved that the mine was improperly ventilated, but that he might have improved the ventilation with the resources at his disposal, but that the requisite provisions for the proper ventilation of the

A.D. 1872. mine would have involved an outlay of £200. It was held that having omitted to employ the resources at his disposal for the improvement of the ventilation of the mine he had committed an offence under sect. 51, for which he was liable to be convicted.

(2) In every mine in which inflammable gas has been found within the preceding twelve months, then once in every twenty-four hours if one shift of workmen is employed, and once in every twelve hours if two shifts are employed during any twenty-four hours, a competent person or competent persons, who shall be appointed for the purpose, shall, before the time for commencing work in any part of the mine, inspect with a safety lamp that part of the mine, and the roadways leading thereto, and shall make a true report of the condition thereof, so far as ventilation is concerned, and a workman shall not go to work in such part until the same and the roadways leading thereto are stated to be safe. Every such report shall be recorded without delay in a book which shall be kept at the mine for the purpose, and shall be signed by the person making the same.

(3) In every mine in which inflammable gas has not been found within the preceding twelve months, then once in every twenty-four hours a competent person or competent persons, who shall be appointed for the purpose, shall, so far as is reasonably practicable immediately before time for commencing work in any part of the mine, inspect that part of the mine and the roadways leading thereto, and shall make a true report of the condition thereof so far as ventilation is concerned, and a workman shall not go to work in such

part until the same and the roadways leading thereto are stated to be safe. Every report shall be recorded without delay in a book which shall be kept at the mine for the purpose, and shall be signed by the person making the same. A.D. 1872.

(4) All entrances to any place not in actual course of working and extension, shall be properly fenced across the whole width of such entrance, so as to prevent persons inadvertently entering the same. Fencing of places not in use.

(5) A station or stations shall be appointed at the entrance to the mine, or to different parts of the mine, as the case may require, and a workman shall not pass beyond any such station until the mine or part of the mine beyond the same has been inspected and stated to be safe. Stations.

(6) If at any time it is found by the person for the time being in charge of the mine or any part thereof that by reason of noxious gases prevailing in such mine or such part thereof, or, of any cause whatever, the mine or the said part is dangerous, every workman shall be withdrawn from the mine or such part thereof as is so found dangerous, and a competent person who shall be appointed for the purpose shall inspect the mine or such part thereof as is so found dangerous, and if the danger arises from inflammable gas shall inspect the same with a locked safety lamp, and in every case shall make a true report of the condition of such mine or part thereof, and a workman shall not, except in so far as is necessary for inquiry into the cause of danger or for the removal thereof, or for exploration, be re-admitted into the mine, or such part thereof as was so found dangerous, until the same is stated by such Withdrawal of workmen in case of danger.

A.D. 1872. report not to be dangerous. Every such report shall be recorded in a book which shall be kept at the mine for the purpose, and shall be signed by the person making the same.

Safety  
lamps and  
lights.

(7) In every working approaching any place where there is likely to be an accumulation of explosive gas, no lamp or light other than a locked safety lamp shall be allowed or used, and whenever safety lamps are required by this Act, or by the special rules made in pursuance of this Act to be used, a competent person who shall be appointed for the purpose shall examine every safety lamp immediately before it is taken into the workings for use, and ascertain it to be secure and securely locked, and in any part of a mine in which safety lamps are so required to be used, they shall not be used until they have been so examined and found secure and securely locked, and shall not without due authority be unlocked, and in the said part of a mine a person shall not, unless he is appointed for the purpose, have in his possession any key or contrivance for opening the lock of any such safety lamp, or any lucifer match or apparatus of any kind for striking a light.

Gunpowder  
and blast-  
ing.

(8) Gunpowder or other explosive or inflammable substance shall only be used in the mine underground as follows :

(a) It shall not be stored in the mine :

(b) It shall not be taken into the mine, except in a case or canister containing not more than four pounds.

*Note to Sect. 51, Sub-section 8 (b).—*(See views of Home Secretary hereon in *Times* of 12th November,

1881.)—Opinion of law officers on this sub-section is A.D. 1872.  
 that the words “When the persons ordinarily employed in the mine are out of the mine” mean that where inflammable gas, that showed a blue cap on the flame of a safety lamp, has been found in any mine three months prior to blasting, only the persons actually employed in the blasting operations may be in the mine during the blasting, and not, as is generally supposed, while the workmen making ready the mine were present in the pit.

(c) A workman shall not have in use at one time in any one place more than one of such cases or canisters :

(d) In charging holes for blasting, an iron or steel pricker shall not be used, and a person shall not have in his possession in the mine underground any iron or steel pricker, and an iron or steel tamping rod or stemmer shall not be used for ramming either the wadding or the first part of the tamping or stemming on the powder :

(e) A charge of powder which has missed fire shall not be unrammed :

(f) It shall not be taken into or be in possession of any person in any mine, except in cartridges, and shall not be used, except in accordance with the following regulations, during three months after any inflammable gas has been found in any such mine ; namely,

(1) A competent person who shall be appointed for the purpose shall, immediately before firing the shot, examine the

A.D. 1872

place where it is to be used, and the places contiguous thereto, and shall not allow the shot to be fired unless he finds it safe to do so, and a shot shall not be fired except by or under the direction of a competent person who shall be appointed for the purpose :

(2) If the said inflammable gas issued so freely that it showed a blue cap on the flame of the safety lamp, it shall only be used—

(a) Either in those cases of stone drifts, stone work, and sinking of shafts, in which the ventilation is so managed that the return air from the place where the powder is used passes into the main return air-course without passing any place in actual course of working ; or,

(b) When the persons ordinarily employed in the mine are out of the mine or out of the part of the mine where it is used : \*

(g) Where a mine is divided into separate panels in such manner that each panel has an independent intake and return air-way from the main return air-course, the provisions of this rule with respect to gunpowder or other explosive inflammable substance shall apply to each such panel in like manner as if it were a separate mine.

\* Note to sect. 51 (f) (2) (b). Night shift included. See Letter Sec. State, Appendix, p. 423.

(9) Where a place is likely to contain a dangerous accumulation of water the working approaching such place shall not exceed eight feet in width, and there shall be constantly kept at a sufficient distance, not being less than five yards, in advance, at least one bore-hole near the centre of the working, and sufficient flank bore-holes on each side. A.D. 1872.  
Water and  
bore-holes.

(10) Every underground plane on which persons travel, which is self-acting or worked by an engine, windlass, or gin, shall be provided (if exceeding thirty yards in length) with some proper means of signalling between the stopping places and the ends of the plane, and shall be provided in every case, at intervals of not more than twenty yards, with sufficient man-holes for places of refuge. Man-holes.

(11) Every road on which persons travel underground where the load is drawn by a horse or other animal shall be provided, at intervals of not more than fifty yards, with sufficient man-holes, or with a space for a place of refuge, which space shall be of sufficient length, and of at least three feet in width, between the waggons running on the tramroad and the side of such road.

(12) Every man-hole and space for a place of refuge shall be constantly kept clear, and no person shall place anything in a man-hole or such space so as to prevent access thereto.

(13) The top of every shaft which for the time being is out of use, or used only as an air shaft, shall be securely fenced. Fencing of  
old shafts.

(14) The top and all entrances between the top and bottom of every working or pumping shaft shall be Fencing of  
entrances to  
shafts.

A.D. 1872. properly fenced, but this shall not be taken to forbid the temporary removal of the fence for the purpose of repairs or other operations, if proper precautions are used.

Securing of shafts.

(15) Where the natural strata are not safe, every working or pumping shaft shall be securely cased, lined, or otherwise made secure.

Securing of roofs and sides.

(16) The roof and sides of every travelling road and working place shall be made secure, and a person shall not, unless appointed for the purpose of exploring or repairing, travel or work in any such travelling road or working place which is not so made secure.

Use of different shafts.

(17) Where there is a downcast and furnace shaft, and both such shafts are provided with apparatus in use for raising and lowering persons, every person employed in the mine shall, upon giving reasonable notice, have the option of using the downcast shaft.

Attendance of engine-man.

(18) In any mine which is usually entered by means of machinery, a competent person of such age as prescribed by this Act shall be appointed for the purpose of working the machinery which is employed in lowering and raising persons therein, and shall attend for the said purpose during the whole time that any person is below ground in the mine.

Signalling.

(19) Every working shaft used for the purpose of drawing minerals or for the lowering or raising of persons, shall, if exceeding fifty yards in depth, and not exempted in writing by the inspector of the district, be provided with guides and some proper means of communicating distinct and definite signals from the bottom of the shaft and from every entrance for the time being in work between the surface and



the bottom of the shaft to the surface, and from the surface to the bottom of the shaft and to every entrance for the time being in work between the surface and the bottom of the shaft. A.D. 1872.

(20) A sufficient cover overhead shall be used when lowering or raising persons in every working shaft, except where it is worked by a windlass, or where the person is employed about the pump or some work of repair in the shaft, or where a written exemption is given by the inspector of the district. Cover over-head.

*Note to Sect. 51, Sub-section 20.*—The 11th sub-section of the Metalliferous Mines Regulation Act, 1872, 35 & 36 Vict. c. lxxvii., is identically the same as this sub-section, and sects. 23 and 31 combined make it an offence in anyone to contravene or not to comply with the 11th and other sub-sections similar to the last clause of sub-section 31 of sect. 51 of the Coal Mines Inspection Act, except that the word “manage” does not occur.

The D. mine had two shafts, in one of which was a man engine with a proper cover, used to lower miners from and raise them to the surface of the mine. In the other was a “skip,” or open box without a cover, used for raising ores and refuse. One Souden, and certain other miners who were then at the bottom of the mine, while the man engine and “skip” were both at work, got into the “skip” and were raised to the surface of the mine. The magistrates before whom they were charged with an offence under sect. 31, thought that the offence could only be in the owner or agent, but the Court of Queen’s Bench Division held that the men were guilty of an offence against the Act.

- A.D. 1872.  
Chains. (21) A single linked chain shall not be used for lowering or raising persons in any working shaft or plane except for the short coupling chain attached to the cage or load.
- Slipping of rope on drum. (22) There shall be on the drum of every machine used for lowering or raising persons such flanges or horns, and also if the drum is conical, such other appliances, as may be sufficient to prevent the rope from slipping.
- Break. (23) There shall be attached to every machine worked by steam, water, or mechanical power and used for lowering or raising persons, an adequate break, and also a proper indicator (in addition to any mark on the rope) which shows to the person who works the machine the position of the cage or load in the shaft.
- Fencing machinery. (24) Every fly-wheel and all exposed and dangerous parts of the machinery used in or about the mine shall be and be kept securely fenced.
- Gauges to boilers and safety valve. (25) Every steam boiler shall be provided with a proper steam gauge and water gauge, to show respectively the pressure of steam and the height of water in the boiler, and with a proper safety-valve.
- Barometer, etc. (26) After dangerous gas has been found in any mine, a barometer and thermometer shall be placed above ground in a conspicuous position near the entrance to the mine.
- Wilful damage. (27) No person shall wilfully damage, or without proper authority remove or render useless any fence, fencing, casing, lining, guide, means of signalling, signal, cover, chain, flange, horn, break, indicator, steam gauge, water gauge, safety valve, or other

appliance or thing provided in any mine in compliance with this Act. A.D. 1872.

(28) Every person shall observe such directions with respect to working as may be given to him with a view to comply with this Act or the special rules. Observance of directions.

(29) A competent person or competent persons who shall be appointed for the purpose shall, once at least in every twenty-four hours, examine the state of the external parts of the machinery, and the state of the head gear, working places, levels, planes, ropes, chains, and other works of the mine which are in actual use, and once at least in every week shall examine the state of the shafts by which persons ascend or descend, and the guides or conductors therein, and shall make a true report of the result of such examination, and such report shall be recorded in a book to be kept at the mine for the purpose, and shall be signed by the person who made the same. Daily inspection of mine.

(30) The persons employed in a mine may from time to time appoint two of their number to inspect the mine at their own cost, and the persons so appointed shall be allowed, once at least in every month, accompanied, if the owner, agent, or manager of the mine thinks fit, by himself or one or more officers of the mine, to go to every part of the mine, and to inspect the shafts, levels, planes, working places, return air-ways, ventilating apparatus, old workings, and machinery, and shall be afforded by the owner, agent, and manager, and all persons in the mine, every facility for the purpose of such inspection, and shall make a true report of the result of such inspection, and such report shall be recorded in a book to be kept at the Inspection of mine on behalf of workmen.

A.D. 1872. mine for the purpose, and shall be signed by the persons who made the same.

Books. (31) The books mentioned in this section, or a copy thereof, shall be kept at the office at the mine, and any inspector under this Act, and any person employed in the mine, may, at all reasonable times, inspect and take copies of and extracts from any such books.

Every person who contravenes or does not comply with any of the general rules in this section shall be guilty of an offence against this Act; and in the event of any contravention of or non-compliance with any of the said general rules in the case of any mine to which this Act applies, by any person whomsoever, being proved, the owner, agent, and manager shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the said rules as regulations for the working of the mine, to prevent such contravention or non-compliance.

*Notes to Sect. 51, Sub-section 31.*—The appointment of a certificated manager in the case of a non-resident part owner of a mine, taking no part in the management, is evidence upon which, without proof of personal interference on the part of such owner, he may be acquitted of an offence under sect. 51 of the Coal Mines Regulation Act, 1872. *Baker v. Carter* (L. R. 3 Ex. D. 132; 47 L. J. M. C. 87; 26 W. R. 497).

In *Wynne v. Forrester* (5 C. P. D. 361), the assistant inspector of mines had given directions to the agent of the colliery, in the absence of the certificated manager, to have a defect in the ventilation, caused by a fall, remedied. Twenty days after he found that nothing

had been done to remedy the defect. Thereupon proceedings were taken against both the agent and the manager. The latter was convicted and fined, but the summons was dismissed as against the agent. The Queen's Bench Division held that the agent of a mine under the Act may be convicted for breach of the regulations prescribed by sub-sections 51 and 52, although the mine is under the control of a duly certified manager. A.D. 1872.

### *Special Rules.*

52. There shall be established in every mine to which this Act applies such rules (referred to in this Act as special rules) for the conduct and guidance of the persons acting in the management of such mine or employed in or about the same as, under the particular state and circumstances of such mine, may appear best calculated to prevent dangerous accidents, and to provide for the safety and proper discipline of the persons employed in or about the mine, and such special rules, when established, shall be signed by the inspector who is inspector of the district at the time such rules are established, and shall be observed in and about every such mine, in the same manner as if they were enacted in this Act. Special rules.

If any person who is bound to observe the special rules established for any mine, acts in contravention of or fails to comply with any of such special rules, he shall be guilty of an offence against this Act, and also the owner, agent, and manager of such mine, unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the

A.D. 1872. said rules as regulations for the working of the mine so as to prevent such contravention or non-compliance, shall each be guilty of an offence against this Act.

*Note to Sect. 52.*—By a special rule in force in the H. mine no person “employed in or about the works” was to ascend the pit contrary to the direction of the looker-on. In the same mine the workmen had power to dismiss themselves at a moment’s notice. Certain workmen, being dissatisfied with their work, discharged themselves. They asked the looker-on to allow them to ascend the pit, but he refused to do so until the ordinary time came for workmen to quit the mine; they, however, ascended contrary to his direction not to do so, and the Court held that by so doing they had been guilty of a breach of the special rule above mentioned. *Highman v. Wright* (2 C. P. D. 397). (See note to sect. 51, *Wynne v. Forrester*.)

Establish-  
ment of  
new special  
rules.

53. The owner, agent, or manager of every mine to which this Act applies shall frame and transmit to the inspector of the district, for approval by a Secretary of State, special rules for such mine within three months after the commencement of this Act, or within three months after the commencement (if subsequent to the commencement of this Act) of any working for the purpose of opening a new mine or of renewing the working of an old mine.

The proposed special rules, together with a printed notice specifying that any objection to such rules on the ground of anything contained therein or omitted therefrom may be sent by any of the persons employed in the mine to the inspector of the district, at his address, stated in such notice, shall, during not less

than two weeks before such rules are transmitted to the inspector, be posted up in like manner as is provided in this Act respecting the publication of special rules for the information of persons employed in the mine, and a certificate that such rules and notice have been so posted up shall be sent to the inspector with the rules, signed by the person sending the same. A.D. 1872.

If the rules are not objected to by the Secretary of State within forty days after their receipt by the inspector, they shall be established.

54. If the Secretary of State is of opinion that the proposed special rules so transmitted, or any of them, do not sufficiently provide for the prevention of dangerous accidents in the mine, or for the safety of the persons employed in or about the mine, or are unreasonable, he may, within forty days after the rules are received by the inspector, object to the rules, and propose to the owner, agent, or manager in writing any modifications in the rules by way either of omission, alteration, substitution, or addition. Secretary of State may object to special rules.

If the owner, agent, or manager does not, within twenty days after the modifications proposed by the Secretary of State are received by him, object in writing to them, the proposed special rules, with such modifications, shall be established.

If the owner, agent, or manager sends his objection in writing within the said twenty days to the Secretary of State, the matter shall be referred to arbitration, and the date of the receipt of such objection by the Secretary of State shall be deemed to be the date of the reference, and the rules shall be established as settled by an award on arbitration.

A.D. 1872.

Amend-  
ment of  
special  
rules.

55. After special rules are established under this Act in any mine, the owner, agent, or manager of such mine may from time to time propose in writing to the inspector of the district, for the approval of a Secretary of State, any amendment of such rules or any new special rules, and the provisions of this Act with respect to the original special rules shall apply to all such amendments and new rules in like manner, as near as may be, as they apply to the original rules.

A Secretary of State may from time to time propose in writing to the owner, agent, or manager of the mine any new special rules, or any amendment to the special rules, and the provisions of this Act with respect to a proposal of a Secretary of State for modifying the special rules transmitted by the owner, agent, or manager of a mine shall apply to all such new special rules and amendments in like manner, as near as may be, as they apply to such proposal.

As to false  
statements,  
and neglect  
of transmis-  
sion of spe-  
cial rules  
to the in-  
spector.

56. If the owner, agent, or manager of any mine to which this Act applies makes any false statement with respect to the posting up of the rules and notices, he shall be guilty of an offence against this Act, and if special rules for any mine are not transmitted within the time limited by this Act to the inspector for the approval of a Secretary of State, the owner, agent, and manager of such mine shall each be guilty of an offence against this Act, unless he prove that he had taken all reasonable means, by enforcing to the best of his power the provisions of this section, to secure the transmission of such rules.

Publication  
of special  
rules.

57. For the purpose of making known the special rules and the provisions of this Act to all persons



employed in and about each mine to which this Act applies, an abstract of the Act supplied, on the application of the owner, agent, or manager of the mine, by the inspector of the district on behalf of a Secretary of State, and an entire copy of the special rules shall be published as follows : A.D. 1872.

- (1) The owner, agent, or manager of such mine shall cause such abstract and rules, with the name and address of the inspector of the district, and the name of the owner or agent and of the manager appended thereto, to be posted up in legible characters, in some conspicuous place at or near the mine, where they may be conveniently read by the persons employed ; and so often as the same become defaced, obliterated, or destroyed, shall cause them to be renewed with all reasonable despatch :
- (2) The owner, agent, or manager shall supply a printed copy of the abstract and the special rules gratis to each person employed in or about the mine who applies for such copy at the office at which the persons immediately employed by such owner, agent, or manager are paid :
- (3) Every copy of the special rules shall be kept distinct from any rules which depend only on the contract between the employer and employed.

In the event of any non-compliance with the provisions of this section by any person whomsoever, the owner, agent, and manager shall each be guilty of an offence against this Act ; but the owner, agent, or

A.D. 1872. manager of such mine shall not be deemed guilty if he prove that he had taken all reasonable means, by enforcing to the best of his power the observance of this section, to prevent such non-compliance.

Defacing  
notices.

58. Every person who pulls down, injures, or defaces any proposed special rules, notice, abstract, or special rules when posted up in pursuance of the provisions of this Act with respect to special rules, or any notice posted up in pursuance of the special rules, shall be guilty of an offence against this Act.

Certified  
copy of spe-  
cial rules to  
be evidence.

59. An inspector under this Act shall, when required, certify a copy which is shown to his satisfaction to be a true copy of any special rules, which for the time being are established under this Act in any mine, and a copy so certified shall be evidence (but not to the exclusion of other proof) of such special rules and of the fact that they are duly established under this Act and have been signed by the inspector.

### PART III.

#### SUPPLEMENTAL.

#### *Penalties.*

Penalty for  
offences  
against Act.

60. Every person employed in or about a mine, other than an owner, agent, or manager, who is guilty of any act or omission which in the case of an owner, agent, or manager would be an offence against this Act, shall be deemed to be guilty of an offence against this Act.

Every person who is guilty of an offence against this Act shall be liable to a penalty not exceeding, if he is an owner, agent, or manager, twenty pounds, and

if he is any other person, two pounds, for each offence; and if the inspector has given written notice of any such offence, to a further penalty not exceeding one pound for every day after such notice that such offence continues to be committed. A.D. 1872.

61. Where a person who is an owner, agent, or manager of or a person employed in or about a mine is guilty of any offence against this Act which, in the opinion of the Court that tries the case, is one which was reasonably calculated to endanger the safety of the persons employed in or about the mine, or to cause serious personal injury to any of such persons, or to cause a dangerous accident, and was committed wilfully by the personal act, personal default, or personal negligence of the person accused, such person shall be liable, if the Court is of opinion that a pecuniary penalty will not meet the circumstances of the case, to imprisonment, with or without hard labour, for a period not exceeding three months. Imprisonment for wilful neglect endangering life or limb.

If any person feel aggrieved by any conviction made by a Court of summary jurisdiction on determining any information under this Act, by which conviction imprisonment is adjudged in pursuance of this section, or by which conviction the sum adjudged to be paid amounts to or exceeds half the maximum penalty, the person so aggrieved may appeal therefrom, subject to the conditions and regulations following:

- (1) The appeal shall be made to the next Court of General or Quarter Sessions for the county, division, or place in which the cause of appeal has arisen, holden not less than

A.D. 1872.  

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twenty-one days after the decision of the Court from which the appeal is made :

- (2) The appellant shall, within seven days after the cause of appeal has arisen, give notice to the other party and to the Court of summary jurisdiction of his intention to appeal, and of the ground thereof :
- (3) The appellant shall, immediately after such notice, enter into a recognizance before a justice of the peace, with two sufficient sureties, conditioned personally to try such appeal, and to abide the judgment of the Court thereon, and to pay such costs as may be awarded by the Court, or give such other security by deposit of money or otherwise as the justice may allow :
- (4) The justice may, if he think fit, on the appellant entering into such recognizance or giving such other security as aforesaid, release him from custody :
- (5) The Court of appeal may adjourn the appeal, and upon the hearing thereof they may confirm, reverse, or modify the decision of the Court of summary jurisdiction, or remit the matter to the Court of summary jurisdiction with the opinion of the Court of appeal thereon, or make such other order in the matter as the Court thinks just. The Court of appeal may also make such order as to costs to be paid by either party as the Court thinks just.

Provided that in Scotland—

- (1) This section shall not apply to any conviction made by a sheriff: A.D. 1872.
- (2) The term “entering into a recognizance before a justice of the peace” shall mean finding caution with the clerk of the justices of the peace to the satisfaction of a justice of the peace, and the term “recognizance” shall mean a bond of caution:
- (3) In Scotland it shall be competent to any person empowered to appeal by this section, to appeal against a conviction by a sheriff to the next Circuit Court, or where there are no Circuit Courts to the High Court of Justiciary at Edinburgh, in the manner prescribed by such of the provisions of the Act of the twentieth year of the reign of King George the Second, chapter forty-three, and any Acts amending the same, as relate to appeals in matters criminal, and by and under the rules, limitations, conditions, and restrictions contained in the said provisions.
62. All offences under this Act not declared to be misdemeanours, and all penalties under this Act, and all money and costs by this Act directed to be recovered as penalties, may be prosecuted and recovered in manner directed by the Summary Jurisdiction Acts before a Court of summary jurisdiction.

Summary  
proceedings  
for offences,  
penalties,  
etc.

Proceedings for the removal of a check weigher shall be deemed to be a matter on which a Court of summary jurisdiction has authority by law to make an order in pursuance of the Summary Jurisdiction Acts,

A.D. 1872. — and summary orders under this Act may be made on complaint before a Court of summary jurisdiction in manner provided by the Summary Jurisdiction Acts.

The “Court of Summary Jurisdiction,” when hearing and determining an information or complaint, shall be constituted—

- (a) In England, either of two or more justices of the peace in petty sessions sitting at a place appointed for holding petty sessions, or of some magistrate or officer for the time being empowered by law to do alone any act authorised to be done by more than one justice of the peace and sitting alone or with others at some court or other place appointed for the administration of justice ; or,
- (b) In Scotland, of two or more justices of the peace sitting as judges in a justice of the peace court, or of the sheriff or some other magistrate or officer for the time being empowered by law to do alone any act authorised to be done by more than one justice of the peace, and sitting alone or with others at some court or other place appointed for the administration of justice ; or,
- (c) In Ireland, within the police district of Dublin metropolis, of one of the divisional justices of that district sitting at a police court within the district, and elsewhere of two or more justices of the peace sitting in petty sessions at a place appointed for holding petty sessions.

63. In every part of the United Kingdom the following provisions shall have effect : A.D. 1872.

General provisions as to summary proceedings.

1. Any complaint or information made or laid in pursuance of this Act shall be made or laid within three months from the time when the matter of such complaint or information respectively arose :
2. The description of any offence under this Act in the words of this Act shall be sufficient in law :
3. Any exception, exemption, proviso, excuse, or qualification, whether it does or not accompany the description of the offence in this Act, may be proved by the defendant, but need not be specified or negatived in the information, and if so specified or negatived, no proof in relation to the matters so specified or negatived shall be required on the part of the informant :
4. The owner, agent, or manager may, if he think fit, be sworn and examined as an ordinary witness in the case where he is charged in respect of any contravention or non-compliance by another person :
5. The Court shall, if required by either party, cause minutes of the evidence to be taken and preserved :
6. A Court of summary jurisdiction shall not impose a penalty under this Act exceeding fifty pounds, but any such Court may impose that or any less penalty for any one offence, notwithstanding the offence involves a penalty of higher amount.

A.D. 1872.

Prosecution  
for offences.

64. No prosecution shall be instituted against the owner, agent, or manager of a mine to which this Act applies for any offence under this Act which can be prosecuted before a Court of summary jurisdiction, except by an inspector or with the consent in writing of a Secretary of State ; and in the case of any offence of which the owner, agent, or manager of a mine is not guilty if he proves that he had taken all reasonable means to prevent the commission thereof, an inspector shall not institute any prosecution against such owner, agent, or manager, if satisfied that he had taken such reasonable means as aforesaid.

Summary  
proceedings  
for offences  
in Scotland.

65. In Scotland the following provisions shall have effect :

- (1) All jurisdictions, powers, and authorities necessary for the Court of summary jurisdiction under this Act are hereby conferred on that Court :
- (2) Every person found liable under this Act by a Court of summary jurisdiction in any penalty, or to pay any money or costs by this Act directed to be recovered as penalties, shall be liable in default of immediate payment to be imprisoned for a term not exceeding three months, and the conviction and warrant may be in the form of No. 3 of Schedule K. of the Summary Procedure Act, 1864 :
- (3) In Scotland any penalty exceeding fifty pounds shall be recovered and enforced in the same manner in which any penalty due to Her Majesty under any Act of Parliament may be recovered and enforced.



66. Nothing in this Act shall prevent any person A.D. 1872.  
 from being indicted or liable under any other Act or Persons not to be punished twice for the same offence.  
 otherwise to any other or higher penalty or punishment than is provided for any offence by this Act,  
 so that no person be punished twice for the same  
 offence.

If the Court before whom a person is charged with an offence under this Act think that proceedings ought to be taken against such person for such offence under any other Act or otherwise, the Court may adjourn the case to enable such proceedings to be taken.

67. A person who is the owner, agent, or manager Owner of mine, etc., not to act as justice, etc., in proceedings under this Act.  
 of any mine to which this Act applies, or the father, son, or brother of such owner, agent, or manager, shall not act as a Court or member of a Court of summary jurisdiction in respect of any offence under this Act.

68. Where a penalty is imposed under this Act for Application of penalties.  
 neglecting to send a notice of any explosion or accident or for any offence against this Act which has occasioned loss of life or personal injury, a Secretary of State may (if he think fit) direct such penalty to be paid to or distributed among the persons injured, and the relatives of any persons whose death may have been occasioned by such explosion, accident, or offence, or among some of them.

Provided that—

- (1) Such persons did not in his opinion occasion or contribute to occasion the explosion or accident, and did not commit and were not parties to committing the offence :

A.D. 1872.

- (2) The fact of such payment or distribution shall not in any way affect or be receivable as evidence in any legal proceeding relative to or consequential on such explosion, accident, or offence.

Save as aforesaid, all penalties imposed in pursuance of this Act shall be paid into the receipt of Her Majesty's Exchequer, and shall be carried to the Consolidated Fund.

In Ireland all penalties imposed and recovered under this Act shall be applied in manner directed by the Fines Act (Ireland), 1851, and any Act amending the same.

Return as in  
Sched. Four  
to be sent to  
inspector of  
district.

69. The owner, occupier, or manager of every mine shall on the first of January every year, and at any other time when required by the Secretary of State, send to the inspector of his district a return of facts relating to his mine in the form given in Schedule Four.

### *Miscellaneous.*

As to ques-  
tion whether  
a mine is a  
mine under  
this Act.

70. If any question arises whether a mine is a mine to which this Act or the Metalliferous Mines Regulation Act, 1872, applies, such question shall be referred to a Secretary of State, whose decision thereon shall be final.

Notices may  
be served  
by post.

71. All notices under this Act shall be in writing or print, or partly in writing and partly in print, and all notices and documents required by this Act to be served or sent by or to an inspector may be either delivered personally, or served and sent by post by a prepaid letter, and, if served or sent by post, shall be

deemed to have been served and received respectively at the time when the letter containing the same would be delivered in the ordinary course of post, and in proving such service or sending it shall be sufficient to prove that the letter containing the notice was properly addressed and put into the post. A.D. 1872.

72. In this Act, unless the context otherwise requires— Interpretation of terms.

The term “mine” includes every shaft in the course of being sunk, and every level and inclined plane in the course of being driven for commencing or opening any mine, or for searching for or proving minerals, and all the shafts, levels, planes, works, machinery, tramways, and sidings, both below ground and above ground, in and adjacent to a mine and any such shaft, level, and inclined plane, and belonging to the mine :

The term “shaft” includes pit :

The term “plan” includes a map and section, and a correct copy or tracing of any original plan as so defined :

The term “owner,” when used in relation to any mine, means any person or body corporate who is the immediate proprietor, or lessee, or occupier of any mine, or of any part thereof, and does not include a person or body corporate who merely receives a royalty, rent, or fine from a mine, or is merely the proprietor of a mine subject to any lease, grant, or license for the working thereof, or is merely the owner of the soil, and not

A.D. 1872.

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interested in the minerals of the mine ; but any contractor for the working of any mine or any part thereof shall be subject to this Act in like manner as if he were an owner, but so as not to exempt the owner from any liability :

The term “agent,” when used in relation to any mine, means any person having, on behalf of the owner, care or direction of any mine, or of any part thereof, and superior to a manager appointed in pursuance of this Act :

The term “Secretary of State” means one of Her Majesty’s Principal Secretaries of State :

The term “child” means a child under the age of thirteen years :

The term “young person” means a person of the age of thirteen years and under the age of sixteen years :

The term “woman” means a female of the age of sixteen years and upwards :

The term “Summary Jurisdiction Acts” means, as follows :

As to England, the Act of the session of the eleventh and twelfth years of the reign of Her present Majesty, chapter forty-three, intituled “An Act to facilitate the performance of the duties of justices of the peace out of sessions within England and Wales with respect to summary convictions and orders,” and any Acts amending the same :

As to Scotland, “The Summary Procedure Act, 1864” :

As to Ireland, within the police district of Dublin A.D. 1872.  
metropolis, the Acts regulating the powers  
and duties of justices of the peace for such  
district, or of the police of such district, and  
elsewhere, “The Petty Sessions (Ireland)  
Act, 1851,” and any Act amending the same:

The term “Court of Summary Jurisdiction” means—  
In England and Ireland, any justice or justices of  
the peace, metropolitan police magistrate,  
stipendiary or other magistrate, or officer,  
by whatever name called, to whom jurisdic-  
tion is given by the Summary Jurisdiction  
Acts or any Acts therein referred to:

In Scotland, any justice or justices of the peace,  
sheriff, or other magistrate, to the proceedings  
before whom for the trial or prosecution of  
any offence, or for the recovery of any penalty  
under any Act of Parliament, the provisions  
of the Summary Jurisdiction Acts may be  
applied.

73. In the application of this Act to Scotland— Application  
of Act to  
Scotland.

(1) The term “Attorney General” means the Lord  
Advocate:

(2) The term “injunction” means interdict:

(3) The term “misdemeanour” means “crime and  
offence”:

(4) The term “chairman of quarter sessions” means  
the sheriff of the county:

(5) The term “sheriff” includes sheriff substitute:

(6) The term “attending on subpoena before a Court  
of record” means attending on citation the  
Court of Justiciary:

A.D. 1872.

- (7) The Queen's and Lord Treasurer's Remembrancer shall perform the duties of a master of one of the superior Courts under this Act :
- (8) The term "stipendiary magistrate" means a sheriff or sheriff substitute :
- (9) Notices of explosions, accidents, loss of life, or personal injury shall be deemed to be sent to the inspector of the district on behalf of the Lord Advocate :
- (10) Section sixteen of "The Public Health (Scotland) Act, 1867," shall be substituted for "section eight of the Nuisances Removal Act for England, 1855, as amended and "extended by the Sanitary Act, 1866."

Existing  
inspectors  
to continue  
to act.

74. The persons who at the commencement of this Act are acting as inspectors under the Acts hereby repealed shall continue to act in the same manner as if they had been appointed under this Act.

Continu-  
ance of  
existing  
special  
rules.

75. The special rules which at the commencement of this Act are in force under any Act hereby repealed in any mine to which this Act applies shall continue to be the special rules in such mine until special rules are established under this Act for such mine, and while they so continue shall be of the same force as if they were established under this Act.

Repeal of  
Acts as in  
Schedule  
Three.

76. The Acts described in Schedule Three to this Act are hereby repealed to the extent in the third column of that Schedule mentioned.

Provided that this repeal shall not affect anything done or suffered before the commencement of this Act, and all offences committed and penalties incurred before the commencement of this Act may be punished and recovered in the same manner as if this Act had not passed.

## SCHEDULES.

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### SCHEDULE ONE.

Table of maximum Fees to be paid in respect of  
Certificates of Managers of Mines.

By an applicant for examination . . .	Two pounds.
By applicant for certificate of service for registration . . . . .	Five shillings.
For copy of certificate . . . . .	Five shillings.

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### SCHEDULE TWO.

Proceedings of Board for Examinations.

1. The board shall meet for the despatch of business, and shall from time to time make such regulations with respect to the summoning, notice, place, management, and adjournment of such meetings, and generally with respect to the transaction and management of business, including the quorum at

meetings of the board, as they think fit, subject to the following conditions :

- (a) The first meeting shall be summoned by the inspector of the district, and shall be held on such day as may be fixed by a Secretary of State ;
- (b) An extraordinary meeting may be held at any time on the written requisition of three members of the board addressed to the chairman ;
- (c) The quorum to be fixed by the board shall consist of not less than three members ;
- (d) Every question shall be decided by a majority of votes of the members present and voting on that question ;
- (e) The names of the members present, as well as of those voting upon each question, shall be recorded ;
- (f) No business shall be transacted unless notice in writing of such business has been sent to every member of the board seven days at least before the meeting.

2. The board shall from time to time appoint some person to be chairman, and one other person to be vice-chairman.

3. If at any meeting the chairman is not present at the time appointed for holding the same, the vice-chairman shall be the chairman of the meeting, and if neither the chairman nor vice-chairman shall be present, then the members present shall choose some one of their number to be chairman of such meeting.

4. In case of an equality of votes at any meeting, the chairman for the time being of such meeting shall have a second or casting vote.

5. The appointment of an examiner may be made by a minute of the board signed by the chairman.

6. The board shall keep minutes of their proceedings, which may be inspected or copied by a Secretary of State, or any person authorised by him to inspect or copy the same.



## SCHEDULE THREE.

Date of Act.	Title of Act.	Extent of Repeal.
5 & 6 Vict. c. 99	An Act to prohibit the employment of women and girls in mines and collieries, to regulate the employment of boys, and to make other provisions relating to persons working therein.	The whole Act so far as it relates to mines to which this Act applies.
23 & 24 Vict. c. 151	An Act for the regulation and inspection of mines.	Sections one to five, both inclusive, so far as they relate to mines to which this Act applies, and the residue of the Act entirely.
25 & 26 Vict. c. 79	An Act to amend the law relating to coal mines.	The whole Act.

# SCHEDULE FOUR.

## MINES REGULATION AND INSPECTION.

*Annual Return from Owner or Agent.*

Name of Pit . . . . . Name of Colliery . . . . . Name of Seam . . . . .  
 Year ending the . . . . . day of . . . . . 18 . . . . .

AVERAGE NUM- BER OF PERSONS EMPLOYED DAILY.	MODE OF VENTILA- TION.	FURNACE OR FAN, WITH DESCRIP- TION.	DIAMETER AND DEPTH OF DOWN- CAST AND UPCAST SHAFTS.				NUMBER OF SPLITS AND QUANTITY.	AVERAGE LENGTH OF AIRWAYS.	SECTIONAL AREA OF AIRWAYS.	AVERAGE TOTAL QUANTITY OF FRESH AIR IN CUBIC FEET PER MINUTE.
			Downcast.		Upcast.					
			Dia- meter in feet.	Depth in feet.	Dia- meter in feet.	Depth in feet.				
Above Ground.						Splits.	Q'antity in cubic feet per minute.			
Under Ground.										

## APPENDIX.

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### No. I.

THE following lease of a colliery has been drawn as simply and briefly as the nature of the transaction will permit. The repetition of the words "heirs and assigns, executors," &c., is dispensed with by a clause at the end, which is adopted from a form used by the Ecclesiastical Commissioners.

This Indenture made the            day of            One thousand eight hundred and sixty-one, between John Wilson of           , Esq., hereinafter called the lessor, of the one part, and James Jones of           , gentleman, hereinafter called the lessee, of the other part. Witnesseth that the said lessor doth hereby demise unto the said lessee all that colliery, coal mine, and seams of coal, whether previously worked or not, known by the name of the Colliery, in the county of G——, within and under the lands of the said lessor, situate in the parish of           , and containing            acres, or thereabouts, a plan of which is annexed to this indenture, and which said colliery was lately in the occupation of Messrs.           , together with the colliers' houses and other houses and buildings belonging to and used with the said colliery; and all engines, gins, engine-houses, lodges, staiths, spouts, boilers, cylinders, pumps, waggon, waggon-ways, rails, sleepers, and all other appurtenances whatsoever to the said

Demise to lessee.

Description of property.	<p>colliery in any wise belonging, and now or heretofore commonly known as part thereof, with liberty to use the present, and sink new pits, drifts, trenches, grooves, water-gates, water-courses, and other works, and lay and repair any new or other waggon-ways, bye-ways, and side-ways, in, over, and along any of the said lands, and to use and repair the present, and make new staiths on such lands for the winning and working, depositing, vending, leading, and carrying on the said colliery and the coals thereof, and also to use those portions of the said lands which are coloured yellow on the said plan, containing      acres or thereabouts, for ground-room, heap-room, and pit-room for laying and placing the coal, stone, earth, rubbish and other substances which shall during the term be gotten out of the colliery, mines, and seams of coal hereby demised, and also any additional land comprised within the said plan, which may during the term be required by the said lessee for the purposes aforesaid, such additional land to be marked out and appropriated, both as to situation and quantity, by the said lessee and the said lessor or their mineral agents respectively, after fourteen days' notice by the said lessee to the said lessor of such requirement, and to use the present, and make new steam and other engines for the purpose aforesaid; also to use the present and build such other houses, hovels, and lodges upon such parts of the land under which the said coal mines or seams are situate as the said lessee shall think most convenient for the workmen to be therein employed. Except and reserved unto the said lessor and his servants, and the tenants for the time being, of the lands over which way-leave is hereby granted, and to the tenants and occupiers of the lands under which the said coal mine or seams of coal are situate, and over which way-leave is hereby granted, liberty and pas-</p>
Powers to lessee.	
Ground- room, and heap-room, &c.	
Exception of right of way.	

sage over and along all the ways hereby granted with waggons, horses, and other animals, and for workmen for all purposes of husbandry, doing as little damage as may be, and without making compensation. To Hold the said colliery, coal mine, and seams of coal, and all the other premises and appurtenances hereinbefore demised and described unto the said James Jones, for the term of            years from the            day of            now last past. Yielding and paying therefore unto the said John Wilson every year during the said term, the certain rent of £            for eighteen hundred tons of coal (other than small and refuse coal), whether such number of tons of coal shall be yearly worked or not; the said yearly rent to be payable and paid on the            day of           , and the day of            in every year by equal portions, and the first payment to be made on the day of            now next ensuing; and also yielding and paying for the use of the said parcel of land, coloured yellow, the yearly surface rent of pounds, and for the use of every additional piece of the lands which might be required by the said lessee for the same purposes the yearly surface rent of            pounds for every acre appropriated for the purposes aforesaid. And also yielding and paying unto the said lessor over and above the said certain rent of £            the further render or royalty of            d. for every ton of coals got out of the said colliery (other than small or refuse coal), in excess of the eighteen hundred tons for which the said certain rent is reserved, the said renders or royalties to be payable and paid on the same days during the said term as the said certain rent is hereinbefore made payable; the said several rents or renders to be paid free of all existing and future rates and taxes, except property tax if any.

Habendum

Rents and royalties reserved.

Coal free of cost for use of engine.

Deficiency clause.

Power to distrain and re-enter.

Provided always and it is hereby covenanted, agreed, and declared by and between the said lessor and lessee, that no royalties or rent shall be paid by the said lessee for any coal used for the stationary engine or ventilating furnaces, or for any purpose of carrying into effect the objects of this demise, which shall be gotten out of the mines and premises hereby demised, but if the said lessee shall work any other property in connection with the mines and premises hereby demised, the coal used for the aforesaid purposes shall be fairly apportioned between each property according to the quantity of coal raised from each work. Provided always and it is hereby further covenanted, agreed, and declared by and between the said lessor and lessee, that if the said lessee shall in any year have paid the said certain rent of £        for the said eighteen hundred tons of coal, and shall have failed to raise that quantity in the same year, and shall in any succeeding year (during a period of        years to be reckoned from the commencement of the year in which such deficiency has occurred) raise more than the said eighteen hundred tons, then, and as often as the same shall happen, it shall be lawful for the lessee in any succeeding year or years within the said period, and before the expiration or determination of the term, to keep back for his own use the royalty on such a quantity of the surplus workings as shall be equal to such deficiency in any such preceding year, but nevertheless the said lessor shall every year receive his said full certain rent of £        in the manner aforesaid. Provided also that if it shall happen that the said certain rent, or other renders or royalties hereby reserved, or any part thereof, shall be unpaid for forty days after the days on which the same ought to be paid, and the same shall have been demanded at or after the expiration of the forty days and not

paid at the time of the demand, then it shall be lawful for the said lessor not only to stop the leading of coals from the said colliery, but also to enter in and upon all the said colliery, and to distrain all the coals there deposited, and all the live and dead stock, plant, machinery, materials, and things whatsoever, used in or about the said colliery hereby demised, and to lead and take away the distresses then and there found, and sell and dispose of the same according to law, until the said rents or royalties, and every part thereof, and also the lawful and reasonable costs of such distress and sale shall have been satisfied, rendering the overplus, if any, to the said lessee; and also to re-enter into and upon the colliery and premises hereby demised, or any part thereof, in the name of the whole, and to have and enjoy the same again in his former estate, notwithstanding this demise. And the said lessee covenants with the said lessor that the said lessee will pay to the said lessor the certain rent and royalties aforesaid at the times aforesaid; and *also* will defray all rates, taxes, and outgoings chargeable by law upon the said colliery and premises; and *also* will keep accurate plans of the workings underground in the office, or other convenient place attached to the said colliery, and permit the same to be inspected from time to time by the said lessor or his agents; and *also* will at his own cost maintain the works and machinery in good order and repair; and *also* will weigh or cause to be weighed by a weighing machine truly adjusted all coals gotten and raised from the said colliery during the said term; and *also* that the lessee will work and carry on the said colliery in a fair and proper manner, according to the best course and method of working collieries in the ————of———; and *also* shall not commit or willingly suffer to be committed any negligent act whereby the said colliery or any part

Covenants  
by the  
lessee; No.  
1, to pay the  
rents.

No. 2, to  
discharge  
rates and  
taxes.

No. 3, to  
keep plans  
of the  
workings.

No. 4, to  
repair.

No. 5, to  
weigh all  
the coals.

No. 6, to  
work in a  
proper  
manner.

No. 7, not to  
commit any  
negligent  
act whereby

- injury may ensue. thereof shall or may be drowned or overburthened with water or foul air from any wastes in the said colliery, or from any neighbouring colliery, or which may occasion or bring any thrust or creep upon the said colliery, or obstruct the watercourses, passages, or drifts belonging to the same; and *also* shall leave a barrier of coal twenty yards in breadth against any other colliery adjoining the same; and *also* shall keep accurate accounts under the hands of the viewer or overman of all such quantities of coal as shall be won and worked out of the said colliery, and deliver the same to the lessor or his agent on request on the first Monday in every calendar month; and *also* that it shall be lawful for the said lessee and his agents from time to time, and at all times during the term, to have free access to inspect the overman's and staithman's books of presentment and leadings relating to the working and leading of coals gotten out of the said colliery; and *also* to inspect the condition and working of the premises; and *also* that the lessee will erect fences and gates, and provide gate-keepers, and make compensation for any damage that may occur from their neglect or the want of such fences; and *also* will compensate the tenants and occupiers of the surface lands under which the seams of coal hereby demised do lie for all actual or consequential damage occasioned by the exercise of the powers by this deed granted, and *also* will at the expiration or sooner determination of the said term yield up unto the lessor the quiet and peaceable possession of the said colliery, way-leaves, and all the other premises hereby demised (including such of the watercourses as shall be necessary for working the remaining part, if any, of the said colliery) in as good condition as the then state of the colliery will admit of; and *further* that it shall be lawful for the lessor, or his next succeeding lessee or lessees, at any time within six calendar
- No. 8, to leave a barrier.
- No. 9, to keep accounts of coal.
- No. 10, to give access to inspect books.
- No. 11, to erect fences and gates.
- No. 12, to make compensation for damage to the surface.
- No. 13, to give peaceable possession at the proper time.
- No. 14, that the lessor or new lessee may sink



months next before the expiration or sooner determination of the term, to enter upon the said colliery and premises, and to sink pits, drive drifts, and make trenches, grooves, and all other works necessary for carrying on the said colliery after the expiration or other determination of the said term; (and *also* that the said lessee shall before the expiration of

pits, &c., six months before the end of the lease.

years from the commencement of this term sink the pit to be called the                      pit to the                      seam of coal, and also during the continuance of the term shall at all times after sinking the said pit, win, work and raise the coal to be gotten out of the said seam of coal at the said pit, so long as the same shall be fairly workable\*), and *also* (if required) will

No. 15, that the lessee will sink a certain pit.

within six calendar months from the expiration or determination of the term fill up such shafts and level for agricultural purposes the surface lands used under the powers hereby granted; and *also* that the said lessee shall not at any time during the said term alien, assign, let, or part with the possession of this indenture of lease, or all or any part of the colliery and premises aforesaid (except by will) to any person or persons whomsoever, for all or any part of the said term, without the consent in writing of the said lessor first had and obtained. *Provided*, nevertheless, that the covenant hereinbefore lastly contained is intended for the sole purpose that the said colliery and premises hereby demised may not be assigned or underlet to any indigent person or persons, and not to restrain the said lessee from assigning or parting with the same or any estate or interest therein to any respectable and responsible person or persons, and that the said lessor will not arbitrarily and without sufficient cause to be stated in writing to the said lessee within one month after the same shall be applied for,

No. 16, that the lessee will level the surface within six months after the end of the lease.

No. 17, that the lessee will not assign without leave.

Proviso as to the meaning of the previous covenant.

\* This clause of course may or may not be required.

Covenants  
by the les-  
sor; No. 1,  
for quiet  
enjoyment.

No. 2, that  
the lessee be  
not com-  
pelled to  
work  
through  
creeps, &c.

Lessee may  
remove coal  
after the end  
of the term.

Agreement  
for a valua-  
tion of ma-  
chinery, &c.

withhold such consent, nor demand any sum of money, premium, or reward for granting the same; and in case of dispute as to what shall be deemed such sufficient cause, the same shall be referred to arbitration, in the manner hereinafter provided:—1. The said lessor covenants with the lessee that the lessee's covenants and liabilities by this indenture entered into and incurred, being duly fulfilled and discharged on his side, the said lessee shall occupy the colliery and premises aforesaid without interruption from the lessor. 2. And further that in the regular working of the said colliery the lessee shall not be compelled to clear away, penetrate, or work through any creep, thrust, or old waste, which may now be in the said colliery, or any seam of coal hereby demised, for the purpose of winning and working any tract or quantity of coal now left in any such seam. 3. And *fur-*  
*ther* that it shall be lawful for the lessee, so long as his said covenants and liabilities shall be duly fulfilled and discharged, at any time within calen-  
dar months from the expiration or determination of the term, to remove from the premises all such coals as shall be wrought and laid above ground at the shaft belonging to the said colliery. And it is hereby agreed and declared between the parties to this in-  
denture that a fair valuation shall be forthwith made by some person or persons to be named and agreed upon by both parties of the engines, boilers, cylinders, spouts, staiths, railways, tramways, and all other articles of the fixed stock and plant belonging to the said colliery, and that copies of such valuation shall be signed by the person or persons making the same, and also by the parties hereto, who shall then each keep one such copy, and that at the expiration or determination of the term a similar valuation shall be made of the fixed stock and plant which shall then belong to and be used in the said colliery, and if the

amount of the said first valuation shall exceed that of the last valuation, then the lessee shall pay to the lessor such sum of money as shall be necessary to make up the difference, but if the amount of the said last valuation shall exceed the amount of the said first valuation, then the lessor shall pay to or permit the lessee to retain out of the rents hereby reserved, and then remaining unpaid, such sum as shall be necessary to make up the difference. And it is hereby further declared and agreed between the parties to these presents, that the live and moveable stock belonging to the lessor, and now used in and about the said colliery, shall be forthwith fairly valued by some person or persons, to be named and agreed upon by both parties, and that the lessee shall pay to the lessor immediately after such valuation shall have been made the full amount thereof in bills to be drawn by the said lessor upon and accepted by the said lessee, and to be payable respectively at (two, four, and six) months from the day of last, each of such bills to be drawn for one (third) part of the said amount. And it is hereby further agreed and declared between the parties to this indenture that the live stock belonging to the said colliery at the expiration or determination of the term, and also all the coals then wrought and gotten thereout, and which shall be then unsold and lying above ground, not exceeding the quantity of tons, shall at the expiration or determination of the term be fairly valued as the stock of a working colliery, and that the lessor shall within twelve calendar months after such valuation shall have been made pay to the lessee the full amount thereof, and that thenceforth the said live stock and coals shall be the property of the said lessor for ever. And it is hereby further agreed and declared between the said parties that any disputes under these presents shall be referred to two arbitrators,

Agreement  
for the im-  
mediate va-  
luation of,  
and pay-  
ment for,  
live stock,  
&c.

Agreement  
for the valu-  
ation of the  
live stock,  
&c, at end  
of term.

Arbitration  
clause.

Proviso for putting an end to the term when the coal is exhausted.

whose written determination thereon (or that of an umpire chosen by themselves in case of difference) shall conclude the disputing parties, and within thirty days from written notice of arbitration each disputing party shall name an arbitrator, and if either shall fail to do so both arbitrators shall be named by the other party, and that the arbitrators or their umpire may call in professional assistance, and may require the personal attendance and examination of the said parties, and those claiming under them, and the production of all documents relative to the dispute, and may determine by whom the expenses of arbitration shall be defrayed, together with the amount thereof. Provided always, and it is hereby further covenanted and agreed between the parties to this lease, that if all the marketable coal that can be fairly worked according to the most approved method of working in the neighbourhood shall be worked out and exhausted before the expiration of this term, and the said lessee shall give notice to the said lessor six calendar months before the end of the year of the term in which such marketable coal shall be worked out, that the same has been or will be worked out, then at the end of that year on payment or tender of all the rents and royalties that may become payable up to the end of such year, the said term shall cease and determine, subject always to such claims as the said lessor may have in consequence of the breach of any of the covenants, provisoes, conditions, or agreements herein contained on the part of the lessee. Provided, lastly, that the heirs and assigns of the said John Wilson, and the executors, administrators, and assigns of the said James Jones, hereinbefore called the lessor and the lessee, shall be bound by and entitled to the benefit of these presents, and the covenants, conditions, provisoes and

Proviso for dispensing with the words "executors, administrators," &c., in the body of the lease.

agreements herein contained, in like manner as if they had been respectively named therein next after the words "lessor" and "lessee" respectively throughout as far as the same will admit, and unless the context or the nature of the case may require a different construction.

In Witness, &c.

## No. II.

### LEASE OF A COLLIERY IN THE NORTH OF ENGLAND WITH SCHEDULES.

This Indenture made the       day       of       .  
Between       of the one part and       of  
the other part.

Witnesseth that in consideration of the rents reserved by this lease, and of the covenants and conditions contained in this lease, and on the part of the lessees to be observed and performed, the said doth hereby so far as he lawfully can or may appoint and demise unto the said       , their executors, administrators, and assigns

The mines, beds, veins, and seams of coal, ironstone, fire-clay, and common clay mentioned and described in the first part of the schedule here under written. Together with the liberties, powers, and privileges to be exercised and enjoyed in connection with the said mines and premises which are mentioned and specified in the second part of the schedule. (Except and reserved out of this demise unto the said       , and other the person or persons, for the time being entitled to the mines and premises, hereby demised, in reversion expectant on this lease, the liberties, powers, and privileges mentioned and

specified in the third part of the said schedule.) To hold the said mines and premises hereby demised unto the said , their executors, administrators, and assigns from the day of for the term of years thence next ensuing. Yielding and paying to the said , or other the person or persons, for the time being entitled as aforesaid, the several rents and sums of money mentioned and specified in the fourth part of the said schedule, subject to the provisions relating to the said rents expressed in the fifth part of the said schedule. And the said do hereby for themselves, their heirs, executors, administrators, and assigns, and, as a separate covenant, each of them doth hereby for himself, his heirs, executors, administrators, and assigns covenant with the said , and other the person or persons, for the time being entitled to the premises, hereby demised in reversion expectant on this lease to the effect and in the manner expressed and set forth in the sixth part of the said schedule. And the said , as to his own acts and deeds, and so as to bind, as far as he can or may, his successors in title, but without being answerable for the acts and defaults of such successors, doth hereby for himself, his heirs, executors, administrators, and assigns and successors in title, covenant with the said , their executors, administrators, and assigns to the effect and in the manner expressed and set forth in the seventh part of the said schedule.

And it is hereby agreed and declared that this lease is subject to the conditions and provisions expressed and set forth in the eighth part of the said schedule, and that such conditions and provisions shall be observed and performed as well by the said , or other the person or persons, for the time being entitled as aforesaid, as also by the said , their executors, administrators, and

assigns, so far as the same ought to be observed and performed by, or otherwise affect them respectively. And it is hereby declared that the schedule here under written shall be deemed part of these presents, and be read and construed accordingly, and in construction of the said schedule, the expression, "the lessor" shall mean and include the said , and also the person or persons for the time being entitled to the premises hereby demised in reversion expectant on this lease. And the expression, "the lessees" shall mean and include the said , their executors, administrators, and assigns, except where the context may require a different construction. In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written.

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The schedule referred to by the above written indenture:—

#### PART I.

All the mines, beds, veins, and seams of coal, iron-stone, fire-clay, and common clay, as well opened as unopened, lying or being in or under all the lands situate in the parish of in the county of , which lands are delineated on the map or plan drawn on the last skin of these presents, and are therein distinguished by a line of red colour drawn round the outer boundary thereof.

#### PART II.

Liberties, powers, and privileges to be exercised and enjoyed in connection with the above mines and premises.

1. Liberty and power to dig, sink, drive, make, repair, and use all such pits, shafts, drifts, levels, sumps, water-gates, water-courses, air-gates, and

other works as may be necessary or proper for searching, for winning, working, and getting the mines and premises, hereby demised, and for ventilating and draining the same. The sites of such pits to be approved by the lessor.

2. Liberty and power to use and appropriate a sufficient part of the said lands adjoining such pits for depositing and heaping thereon the coals and other minerals, hereby authorised to be gotten from the said mines and premises, and all the earth, soil, and other substances dug up and brought to the surface in or about the working of the same.

3. Liberty and power to convert into coke the coal and to calcine the iron-stone, so to be gotten from the said mines and premises, and to manufacture the fire-clay and common clay into bricks, whether for colliery purposes, or for sale, or otherwise.

4. Liberty and power to take, load, and carry away over the said lands, the coal, iron-stone, and fire-clay to be gotten from the said mines and premises, and the coke and bricks to be made and manufactured under the liberties and powers hereinbefore granted, and to dispose of the same at their own will and pleasure.

5. Liberty and power to erect, set up, make, and construct, and to take down and remove, and again to erect, set up, make, and construct in, upon, and over the said lands any houses for the residence of miners and workmen employed in and about the said mines and premises, sheds, engines, machinery furnaces, ovens, kilns, buildings, erections, railroads, and other roads, and works necessary or convenient for the effectual working of the mines and premises hereby demised, and the exercise of the several liberties and powers hereinbefore granted. The sites to be approved by the lessor, and in case any difference of opinion should arise between the lessor and



the lessees with regard to the plan of such houses for miners, the matter to be referred to arbitration as hereinafter provided.

6. Liberty and power to dig, work, and take stone from the said lands, for the purposes of the colliery and works hereby authorised, but not for any other purpose.

7. All other easements, rights, and privileges whatsoever usual and proper for the effectual and convenient working of the said mines and premises, and the exercise of the several liberties and powers hereinbefore granted according to the most approved custom of mining in the district.

Provided always that all pits and shafts to be dug and sunk, and all houses, sheds, engines, machinery furnaces, ovens, kilns, buildings, erections, railroads, and other roads, and works to be erected, set up, made, and constructed, and all other surface operations whatsoever to be carried on by virtue of the liberties, powers, and privileges hereinbefore granted, shall be respectively dug, erected, set up, made, and constructed in and upon such part only of the said lands as shall be selected for that purpose in the manner following: That is to say, whenever the lessees shall require the use of the surface of any land for any of the purposes aforesaid, they shall give notice thereof specifying the site proposed to the lessor or his agent, who shall, within        days after receiving such notice, if he object to the site proposed, select a site for the purpose, and notify the same to the lessees, and the lessees shall be at liberty at any time within        days after the selection of such site shall have been made and notified to them as aforesaid, but not afterwards, to object to the same as being improper and inconvenient for the purpose for which the same is required, and to notify such objection to the lessor or his agent. And in case of

such objection being made and notified as aforesaid, it shall be referred to the Government inspector of mines for the district to decide whether the site selected by the lessor or his agent as aforesaid is or is not a proper and convenient site for the purpose for which the same shall be required, and if the Government inspector shall decide against such site, or if the lessor or his agent shall neglect or refuse to select a site for any of the purposes aforesaid for the space of      days after receiving a notice from the lessees requiring them so to do, then, and in either of such cases, the site first selected by the lessees may be occupied by them as proposed. Provided also that if the Government inspector shall decline to permit the aforesaid reference to be made to him, the matter above directed to be referred to him shall be referred to arbitration under the provisions in that behalf hereinafter contained.

### PART III.

Exceptions and reservations out of this lease.

Liberty for the lessor and his tenants, agents, servants, and workmen to use any railroads and other roads to be made and used by the lessees over the said lands under the authority of these presents, without paying any rent for the same; and also liberty for the lessor to make, construct, and use, and to grant and demise to other persons the right to make, construct, and use over the said lands any railroads and other roads crossing and intersecting any railroads or other roads made and used by the lessees under the authority of these presents. Provided nevertheless that, in the exercise of the liberties hereby excepted and reserved, as little hindrance, obstruction, or damage as possible be done to the lessees, or to the exercise by them of the liberties, powers, and privileges hereby granted to them.

## PART IV.

Rents reserved by this lease.

1. The certain yearly rent next hereinafter mentioned (that is to say) the yearly rent of £        for the first and second years of the term hereby granted, the yearly rent of £        for the third and fourth years of the said term, and the yearly rent of £        for the remainder of the said term. The certain yearly rent payable for the time being as aforesaid to be paid by equal half-yearly payments on the day of        and the        day of        in every year. For and in respect of which yearly rents, the lessees may work and get in, every year, from and out of the said mines and premises, such a quantity of coal as, at the rates hereinafter mentioned, would produce for that year a tentale rent equal in amount to the said certain rent. But the said certain rent shall always be paid whether such quantities shall in fact be gotten or not.

2. The rent of        for every ten\* of screened coals, and        for every ten of small coals (and so in proportion for any less quantity than a ten) which shall be gotten from or out of the said mines and premises over and above the quantity which the lessees are hereinbefore authorised to work and get in respect of the said certain rent.

3. The rent of        for every ton of ironstone which shall be raised in the raw state from the said mines and premises, and so in proportion for any less quantity than a ton.

4. The rent of        for every ton of fireclay which

\* A "ten" is a measure of quantity only employed (as in this lease) for the purpose of determining the amount of rent to be paid by the lessees of mines to the lessor. It is confined to the north of England.

shall be raised in the raw state from the said mines and premises (except fireclay used by the lessees in and about the erection of buildings for colliery purposes under the liberties and powers hereby granted, and which fireclay they are hereby authorised to use for such purposes rent free).

5. The rent of                      for every 1000 of common bricks made with clay raised or gotten from or out of the said mines and premises (except bricks used by the lessees in or about the erection of buildings for colliery purposes under the liberties and powers hereby granted, and which bricks they are hereby authorised to make and use for the purposes aforesaid rent free).

All which rents for coal, ironstone, and bricks, 2ndly, 3rdly, 4thly, and 5thly, above reserved, shall be paid respectively on the                      day of                      and on the                      day of                      , in every year, for and in respect of the coal, ironstone, and fireclay raised or the bricks manufactured during the then preceding half year.

6. A yearly rent for and in respect of every acre of land the surface whereof shall be occupied or used by the lessees under the authority of these presents, double in amount of the value per acre of the same land for agricultural purposes, at the time when such occupation or use shall commence, and so in proportion for any less quantity than an acre. The said surface rent to be paid half-yearly on the                      day of                      and on the                      day of                      in every year ; the first of such payments to be made on such of the said half-yearly days as shall happen next after such occupation or use shall have commenced, and the last of such payments to be made on the half-yearly day of payment which shall happen next after such occupation or use shall have ceased, and the land shall have been restored and rendered fit for

cultivation again, or shall have been paid for at the fee simple value as provided in the Lessees' Covenant No. 14, contained in Part 6 of this Schedule. And in case any difference of opinion shall arise as to what ought to be considered the occupation or use of the surface of any land for the purpose aforesaid, or as to the day on which such occupation or use shall have commenced, or as to the amount of rent payable under such reservation, the matter in difference shall be settled by arbitration.

## PART V.

Provisions relating to the said rents.

1. All the aforesaid rents shall be paid free from any deduction except for property tax.

2. For the purposes of the above reservations, a ten of coals shall be considered to contain 440 bolls or  $18\frac{1}{3}$  Newcastle chaldrons of 53 cwt. each; and the term small coal shall be considered to mean all coal which shall have passed through a screen the bars of which shall not exceed  $\frac{5}{8}$ ths of an inch, as under; and the term screened coal shall be considered to mean all coal which shall not pass through such screen.

3. All coals used by the lessees for the usual and customary purposes of the colliery, and for domestic consumption in the houses and offices of agents and workmen for the time being employed in and about the said mines and premises, shall be free from rent.

4. If in any year of the said term the lessees shall not get and raise from the said mines and premises such a quantity of coal as at the above-mentioned rates would produce for that year a tentale rent equivalent to the certain rent payable for that year, then and in every such case the lessees may in any subsequent year or years of the said term get and raise from or out of the said mines and premises such

quantity of coal as shall be required to make up the deficiency, without paying any rent for the same other than the said certain rent. But the overworkings of any preceding year or years of the said term shall not come in aid of or be applied to make good the deficiency or short workings in any subsequent year or years.

## PART VI.

### The lessees' covenants.

1. The lessees shall pay to the lessor the rents reserved by this lease at the times and in the manner above appointed for payment thereof, and shall also pay and discharge all taxes, rates, cesses, charges, and assessments or impositions whatsoever now or hereafter to be taxed, charged, cessed, assessed, or imposed upon or in respect of the premises hereby demised, or any part thereof, except any tax upon income or property properly payable by the landlord.

2. The lessees shall not during the said term assign, underlet, or otherwise part with the mines and premises hereby demised, or any part thereof, to any person or persons whomsoever without the licence or consent in writing of the lessor for that purpose first had and obtained.

3. The lessees shall, at the expiration of one calendar month after the end of every year of the said term, pay to the lessor, for the use of himself or his tenants, full and reasonable satisfaction for the injuries or spoil which during each such preceding year shall have been committed to or upon the aforesaid lands, or upon any houses, buildings, crops, or other property thereon, by means or in consequence of the exercise of any of the liberties, powers, and privileges granted by this lease; and the amount of such satisfaction shall, in case of dispute, be settled by

arbitration under the provisions hereinafter contained.

4. The lessees shall at all times during the said term keep or cause to be kept at the office or counting-house of the colliery, to be situated in or contiguous to some part of the said lands, correct and intelligible books of account, upon such plan or principle as is generally adopted in such cases; which books shall contain accurate entries of the quantity of coals and other minerals wrought and brought to bank from the mines and premises hereby demised, and of all bricks manufactured under the authority of these presents. And also shall, at their own costs and charges, furnish monthly true and correct copies of such accounts, and of all bills of presentment, to the lessor or his agent when thereunto by him required.

5. The lessees shall at all times during the said term cause to be made and kept at the said office or counting-house true, correct, and intelligible plans and sections of all the said mines hereby demised, which plans and sections shall show as well the operations and workings which have been carried on as all and singular the dykes, troubles, veins, faults, and other disturbances which have been observed and encountered in such workings and operations; and all such plans and sections shall be made, amended, and filled up by and from actual surveys to be made for that purpose at the end of every period of three months; and the lessees shall, at their own costs and charges, furnish to the lessor or his agent true and correct copies of such plans and sections when thereunto required.

6. It shall be lawful for the lessor and his agents and servants, at all reasonable times during the said term, to enter into and have free access to the said office or counting-house for the purpose of examining

and inspecting the said several books of account, plans, and sections, and also all railway accounts and vouchers for carriage, and to take copies thereof, and to make extracts therefrom respectively.

7. The lessees shall keep all tubs, baskets, vessels, waggons, or other carriages by which coals and other minerals are drawn or brought to the surface of one uniform measure and size, and shall not alter the measure or size thereof without notice in writing to the lessor or his agent three calendar months at least before any alteration shall be made in the same.

8. The lessor and his agents and servants may, at any time during the said term, measure and gauge the tubs, vessels, waggons, or other carriages of the lessees used for the purposes aforesaid; and if on any such occasion any such tub, basket, vessel, or waggon, or other carriage shall be found to be capable of carrying more than the acknowledged and specified quantity, then the lessor or his agent may stop such of them as carry over measure until the lessees shall reduce the same to the uniform and proper size and capacity. And all such tubs, vessels, and other carriages so carrying over measure shall be considered to have carried the same for three calendar months previous to such discovery, or from the last occasion of so measuring and gauging the same as aforesaid, in case such occasion shall be within such period of three months, and shall be reckoned and accounted for accordingly.

9. The lessees shall forthwith commence to sink a pit on the said lands down to the seam of coal, and shall continue the sinking thereof regularly and properly and in a skilful and workmanlike manner until the said seam shall be effectually worked and won.

10. The lessees shall at all times during the said



term win and work the said mines and premises hereby demised in a proper, fair, and regular manner, and according to the most approved practice of winning and working mines of the like nature in the counties of \_\_\_\_\_, and with as little damage as possible to the surface and to the messuages, dwellings, walls, fences, and other property thereon. And also shall, at all places when the said mines hereby demised shall adjoin any mines not included in this lease, leave unworked within the limits of this demise a sufficient barrier not less than \_\_\_\_\_ yards in thickness of whole coal or other mineral then for the time being in course of working, and shall not break through or thin the same without the licence of the lessor or his agent in writing.

11. The lessees shall well and properly secure and keep open, with timber, stone, or other durable means, all pits and shafts to be sunk or made in the said lands, and make and maintain sufficient walls and fences round every such pit or shaft. And also shall at all times during the said term keep the said mines and beds hereby demised free from water and from foul air as far as possible.

12. The lessees shall permit the lessor and his agents, servants, and workmen, at all reasonable times during the said term, to descend any pits or shafts of the lessees into the mines and works hereby demised, and to examine the said mines and works, and make plans thereof, and afterwards to return from the same without any hindrance or interruption whatsoever; and for that purpose shall permit the lessor and his agents, servants, and workmen to use all the machinery and appurtenances employed in or about the said mines and works, and with overmen, deputy overmen, or other proper persons employed by the lessees, and acquainted with the workings of the said mines, shall effectually assist such person

or persons as aforesaid in going down any such pits and shafts, and entering into, examining, and surveying the said mines and works in manner aforesaid, and in returning to the surface.

13. The lessees shall, at the end or sooner determination of the said term, deliver up to the lessor, in good order, repair, and condition, and fit for the future workings of the said mines and premises hereby demised, all engine-houses and buildings of stone or brick, pits, shafts, water-courses, air-gates, and levels in the said mines and premises. And also all and singular the moveable machinery, works, articles, and things which shall be in, upon, or under the said land, and which the lessor shall elect to purchase under the power in that behalf hereinafter given to him. And also shall, at the end of the said term, bank up all coals at the pit, not exceeding three months' vend, in such manner as to be no hindrance to an incoming tenant.

14. The lessees shall, at or before the expiration or determination of the said term, cause to be restored to their original or natural condition all such parts of the said lands as shall have been appropriated or used for any of the purposes of this demise, or shall, at the option of the lessor, pay to the lessor the value of the fee simple of the same; such value to be estimated at thirty years' purchase of the value per acre of the same land for agricultural purposes at the time when the occupation or use thereof for the purposes of this demise shall have commenced.

## PART VII.

### The lessor's covenants.

1. The lessees paying the rents hereby reserved, and observing and performing the covenants and conditions herein contained, and in their part to be observed and performed, shall and may at all times

during the said term peaceably and quietly possess and enjoy the mines and premises hereby demised, and exercise the several liberties, powers, and privileges hereby conferred, without any interference by the lessor or any person lawfully or equitably claiming under him.

2. The lessees may, within the space of six calendar months after the expiration or sooner determination of the said term, carry away and dispose of all the coal and other minerals which shall have been raised and gotten from the said mines and premises during the said term, and shall not have been carried away, and may also remove for their own use the moveable machinery, articles and things belonging to or used or employed in or about the said mines and works, or such of them as shall not be purchased by the lessor under the power in that behalf hereinafter contained.

## PART VIII.

### General provisions.

1. If the rents hereby reserved, or any of them, or any part thereof respectively, shall be behind or unpaid for the space of 40 days next after any of the days whereon the same ought to be paid, then, and so often as the case shall happen, the lessor may enter into and upon the mines and premises hereby demised, or any lands which shall, for the time being, be possessed or occupied by the lessees for the purposes of these presents, and may distrain all or any of the coal and other minerals, horses, engines, trams, waggons, whimsies, tools, implements, baskets, machines, or other the utensils, matters, and things which shall be found in or upon the same premises, and the same may take, lead, and drive, carry away and impound, detain and keep, or otherwise dispose thereof according to law, until the rent which shall



shall signify such his desire to the lessees by a notice in writing to be given to them or left for them at their office or counting-house aforesaid, at least six calendar months before the expiration or other sooner determination of the said term (unless the said term shall be determined under the power of re-entry hereinbefore contained, in which case the notice may be given or left at any time within six calendar months after such determination of the said term), then and in such case the machinery, articles and things specified in such notice shall be left by the lessees and be taken by the lessor at a valuation to be made thereof, in case of any difference or dispute between the parties as to their value in the manner hereinafter provided, and the amount of such valuation, when ascertained or settled, shall be paid to the lessees within three calendar months next, after such valuation shall have been agreed upon and delivered to the parties together with interest money after the rate of £4 per cent. per annum from the time of such delivery thereof.

5. If any dispute or difference shall arise between the lessor and the lessees concerning the value of the machinery, articles and things which the lessor shall elect to take or detain as aforesaid, or the amount to be paid by the lessor in respect thereof, or touching or concerning any other matter or thing which it is hereby provided, shall be settled by arbitration in case of dispute or difference, or touching any clause, matter or thing whatsoever herein contained, or the operation or construction thereof, or any matter or thing in any way connected with these presents, or the rights, duties, or liabilities of either party in connection with these presents, then and in every such case (except where hereby otherwise expressly provided) the dispute or difference shall be referred to arbitration in manner following,

that is to say—each of the parties in difference shall appoint an arbitrator, and the two arbitrators shall appoint an umpire either at once or after difference shall have arisen between them. And in case either of the said parties in difference shall neglect or refuse to appoint an arbitrator for fourteen days after notice in writing given by the other party requiring him so to do, then and in every such case the arbitrator chosen by the party giving such notice, may, by any writing under his hand, nominate and appoint a person to act as arbitrator on the part of the person refusing or neglecting as aforesaid, and the award of the said two arbitrators or their umpire, as the case may be, shall be final and conclusive, and the submission and reference to such arbitration may, on the application of either of the parties, be made a rule of any of Her Majesty's Courts at Westminster.

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### No. III.

#### LEASE OF COAL IN A SETTLED ESTATE.

By the 40th & 41st Vict. c. xviii., called, The Settled Estates Act, 1877, it is enacted that the Court of Chancery may authorise leases not exceeding in the case of minerals forty years in duration, and on condition that a certain portion of the whole rent or payment reserved, shall be from time to time set aside and invested, namely, one fourth part, when the person entitled to the receipt of the rent is himself entitled to work the minerals for his own benefit, and three fourths in other cases. The due application of such portions must be ensured by the appointment of trustees or otherwise as the Court

deems expedient. By sect. 46 tenants for life or years, under settlement, and tenants by courtesy, or in dower, or in right of a wife who is seised in fee, may lease for twenty-one years without application to the Court, upon certain conditions; but such demise must not be without impeachment for waste. Consequently such person cannot lease the minerals without the sanction of the Court.

The following is an extract from a lease of coals under a settled estate in Yorkshire, granted under the authority of the Court of Chancery, and the statute 19 & 20 Vict. c. cxx. This form may easily be adapted to lease under The Settled Estates Act, 1877. In this lease the seams of coal are let at so much per acre with a minimum rent for two acres, whether the coal shall be raised or not, and with power to make up for any deficiency.

“This Indenture made the                      day of                      ,  
&c., as to the terms and provisions thereof, with the  
approbation of the Vice-Chancellor                      as Sanction of  
the Court of  
Chancery.  
appears by the certificate of the chief clerk of the said  
judge, dated the                      , &c., made in  
pursuance of an order made the                      in the  
matter of an Act passed in the 19th and 20th years of  
the reign of Her present Majesty Queen Victoria,  
c. cxx., intituled an Act to facilitate leases and sales  
of settled estates, and in the matter of the  
estate, situate in                      and as to the persons  
who are named as lessors subject to an order of the  
said Court to be obtained for that purpose in the  
said matter, and which order is intended to be en-  
dorsed hereon. Between &c. &c. Witnesseth that  
in consideration of the payments, reservations, cove-  
nants, and agreements hereinafter reserved and con-  
tained on the part of the said X. Y., his executors,  
administrators and assigns. They, the said A. B. and  
C. D. in exercise of the power for that purpose vested

in them by the said order of the do and  
 Demise. each of them doth by these presents grant demise  
 and lease unto the said X. Y. all that or so much of  
 all that mine, vein, or seam of coal commonly called  
 the , as is lying within and under all those  
 Parcels described. closes or portions of closes situated in the township of  
 , &c. forming part of the said estates,  
 as the same are now in the occupation of C. D. and  
 known by the names of and containing the quantity  
 following or thereabouts (describe the several closes  
 and quantities) together with liberty, &c. &c. (which  
 Liberties and powers. may be taken from the other forms) to Have and  
 Habendum. to Hold the said mine, &c. of coal and premises  
 hereby granted and demised with the liberties afore-  
 said, for the full term of years thenceforth next  
 Reservation of rents. ensuing. Yielding and paying therefor unto the  
 said A. B. and C. D. &c. the yearly rent of  
 (say £300) sterling as and for the price of two acres  
 of the said mine, &c. of coal, whether that quantity  
 shall be gotten or not in any one year by equal half  
 yearly portions on, &c., until such time as the whole  
 of the said demised mine, &c. of coal shall be paid  
 for at the rate of £150 for every acre thereof and so  
 in proportion for any fractional part of an acre, the  
 first payment to be made on, &c. But when such  
 rent shall have been paid for the whole of the said  
 mine, &c. of coal, at the rate aforesaid, including the  
 pillars hereinafter mentioned, then in lieu thereof,  
 during the remainder of the said term, the yearly rent  
 of a peppercorn if demanded. Also yielding and  
 paying during the continuance of this demise in  
 manner aforesaid unto, &c. the further sum of £200  
 for every acre of the said mine, &c. of coal hereby  
 demised, and so in proportion for any fractional part  
 of an acre thereof, which shall be worked or gotten  
 out of the said lands in any one year of the said  
 term over and above the quantity of two acres so



hereinbefore agreed to be paid for annually as aforesaid, the first payment of the said last mentioned rent to be made on the half yearly day which shall next happen after such additional quantity of coal shall be gotten as aforesaid. Provided always that if the said X. Y. &c. shall not win, work, and get out of the said lands the quantity of two acres of the said mine, &c. of coal in any one year, that then and so often it shall be lawful for him and them in any following year or years of the term to work, win, and carry away all such deficiency over and above the said stipulated quantity of two acres without paying any further or other yearly rent than the rent of £300 aforesaid, but nothing in this proviso or these presents shall be construed to excuse or lessen the said yearly rent of £300 or the rent in respect of any excess of getting as aforesaid." Then follow the ordinary provisoes and covenants, and lastly a declaration that the lessors will stand possessed of and interested in the rents, covenants, &c., reserved and entered into upon trust to apply the former and act as to the latter as shall be directed by the Court of Chancery in the matter of the Act of Parliament referred to and of the said settled estates.

Average  
clause.

Covenants.

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#### No. IV.

#### LEASE OR GRANT OF A WAY-LEAVE OR RIGHT OF USING A RAILWAY.

This Indenture made the            day of            18    ,  
between John Cox, hereinafter called the grantor,  
of the one part, and James Ward, hereinafter called  
the grantee, of the other part, witnesseth that the Demise.

said grantor doth by these presents grant and demise  
 unto the said grantee full licence, right and authority  
 for himself and his agents, workmen and servants to  
 use, for the purposes hereinafter mentioned, at all  
 times (between the hours of five in the morning and  
 eight in the evening), all that railway extending in  
 one continued line from A, in the parish of B, to C,  
 in the parish of D (describe the way accurately),  
 with liberty to pass and repass along the said line,  
 and with all usual waggon and other carriages  
 drawn by horses or moved by steam or other  
 engines, of any kind whatsoever, to convey all such  
 coal and other minerals as shall from time to time  
 be raised by the grantee out of all that mine (describe  
 particularly the mine, colliery, pit, or seams); and to  
 convey all other materials and things which shall be  
 thought necessary or proper for carrying on the said  
 mine; and for the purposes aforesaid to use all the  
 fixed engines, machinery, buildings, and works  
 belonging to the said railway. Together with all  
 other privileges and appurtenances to the said  
 right of way belonging. To Have and to Hold  
 the said licence, right, and authority, and all the  
 other premises hereby demised unto the grantee,  
 from the            day of            18    , for the full term  
 of            years therein next ensuing. Rendering and  
 paying therefor, every year, by four equal quarterly  
 payments, on the usual quarter days, the sum of  
 pounds, the first quarterly payment to be due and  
 payable on the 25th day of March now next ensuing.  
 And the said grantee covenants with the said grantor  
 that he, the said grantee, will pay to the said grantor  
 the rent aforesaid at the times aforesaid, and also  
 will defray all outgoings, rates and taxes chargeable  
 by law upon the premises. And also shall at all  
 times during the said term permit the said grantor  
 and all persons duly authorised by him to use and

Subject-  
matter of  
the demise.

Liberties  
and powers.

Habendum.

Reservation  
of rent.

Covenants.

enjoy the said railway for any similar purposes, with as little interruption as possible, and shall accordingly enter into and adopt all reasonable arrangements, which shall be proposed from time to time by the said grantor, or other persons aforesaid, in that behalf. And also shall at all times do as little injury as possible to the said railway, and the sides, rails, fences, and drains thereof, and the buildings, works, and property connected therewith. And also shall from time to time during the said term, except during the last year thereof, contribute his just share of such reasonable costs as shall be required to be incurred for the laying of new rails, or the necessary repair and support of the said railway, and of all the sides, rails, fences, drains and walls belonging thereto, and of so much of the engines, rollers, ropes, buildings, machinery, and works held therewith as shall be used and enjoyed by the said grantee in common with any other persons whomsoever. And also shall and will at all times during the said term keep and preserve the said railway, buildings, fixed engines, machinery, rollers, ropes and works hereby authorised to be used and enjoyed in common as aforesaid in good repair, and fit for the purposes of the rights and liberties hereby granted and demised. Provided always and it is hereby agreed that if at any time during the term the said grantee shall neglect or refuse to perform any of the covenants and agreements in this deed contained on his part to be observed, then it shall be lawful upon any such breach for the said grantor by notice in writing, signed by him and delivered to the said grantee, or left at his usual or last place of abode, to declare that these presents and the right and liberty thereby granted shall thenceforth determine, and therefore these presents shall forthwith become absolutely void, except in respect of any

Power to  
grantor to  
terminate  
the lease  
for breach  
of covenant.

previous breach of the covenants and agreements herein contained. Provided also—(Here may be inserted powers to distrain on non-payment of rent, a covenant by the grantor for quiet enjoyment, and a proviso similar to that at the end of Form No. I.; by which the covenants, agreements, &c., shall be declared to bind the heirs &c. in like manner as if they had been respectively named after the words grantor and grantee.) In witness where-to, &c.

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## No. V.

### VARIOUS COVENANTS AND PROVISOS.

#### *Clause A.*

To provide  
for the bank-  
ruptcy, &c.,  
of the lessee.

This clause may be added to the covenant to pay the rent: "And if the said (lessee) his executors, &c., shall be adjudged a bankrupt, or make any composition with his or their creditors, for the payment of his or their debts, or take the benefit of the statutes for the relief of insolvent debtors, then it shall be lawful for the said (lessor), his heirs or assigns, to re-enter into and upon the said demised lands, colliery, seams of coal, and premises hereby demised and re-possess and enjoy the same, as if these presents had not been made."

#### *Clause B.*

Provision  
for requir-  
ing trials  
through  
faults and  
dislocations

This is a proviso to meet the contingency of a fault or dislocation being met with: "Provided also, &c., that if in working the said seam any fault or dislocation shall at any time be discovered, the said (lessee) if required, shall at his own expense make proper and

reasonable trials through such faults or dislocations for the purpose of ascertaining whether or no the seam so interrupted is workable and marketable beyond such fault or dislocation, and if such seam shall be found workable and marketable, shall at his own expense continue the working thereof."

### Clause C.

This covenant is to prevent excavations under buildings on the surface under which the seams demised are situate: "And also that the said (lessee), &c., shall not, unless authorised to do so by the lessor, extend his workings under any farm or other house or buildings now or hereafter to be erected on the lands delineated on the map hereto annexed, nor within the distance of ten yards on each side thereof; but in the event of any damage to such erections by the act or default of the said (lessee), &c., in violation of this stipulation reasonable compensation shall be made in respect of the same, and the said (lessor), &c., shall be kept indemnified against any suit or suits at law for damages in respect of the same."

Covenant  
not to work  
under  
buildings.

### Clause D.

This is a proviso to enable the lessee to work coals in any adjoining mines, and *vice versa*, by access thereto from the seam demised: "Provided always, &c., that the said (lessee), &c., shall have liberty and licence to make an outstroke into any adjoining mines, and by means thereof to work any minerals therefrom upon payment of a way-leave in respect thereof of (say) 1d. per ton, but so that such outstroke be so constructed and driven as that the said (lessee) at his own expense shall not be precluded from effectually stopping up the same by sufficient

Power to  
lessee to  
make out-  
strokes and  
instrokes, to  
and from  
adjoining  
workings,  
with bound-  
ary marks.

frame-dams or other dams to be placed therein at the expiration or determination of this term, and also shall have liberty, subject to the same condition as to dams, to work any portion of the seams hereby demised by means of an instroke from any adjoining property ; but both the said liberties and powers to be subject to the further condition that the said (lessee), &c., shall cause distinct and sufficient marks to be made and maintained on the roof or side of every level heading or stall that may cross and pass over the boundary of the seams of coal hereby demised into or out of any adjoining workings so as to enable the said (lessor), &c., to determine and check the accuracy of the surveys kept by the said (lessee), &c."

*Clause E.*

Another  
form of an  
average or  
deficiency  
clause.

"Proviso. Provided always, and it is hereby agreed and declared by and between the parties hereto that after the said dead or certain rent of shall become payable as aforesaid notwithstanding the reservations hereinbefore contained of the said royalties on minerals no such royalties shall be actually paid or payable in any year unless the amount of such royalties in that year exceed the amount of the said dead or certain rent, it being the true intent of the parties hereto that in case in any current year of the term hereby granted the amount of the royalties on minerals wrought in such year shall fall short of the dead or certain rent payable for such year, the said dead or certain rent only and no royalty shall in that year be actually paid, but that in case the royalties shall in any current year of the term hereby granted exceed the said dead or certain rent payable for such year, then so much and no more of the said royalties as shall exceed the amount of the said dead

or certain rent shall in such year be actually payable in addition to the said dead or certain rent."

Provided also, and it is hereby further agreed and declared that if in any half-year of the said term hereby granted after the said dead or certain rent shall have become payable as aforesaid, the said A. B., his executors, &c., shall not work, obtain, or bring to the surface from or out of the mines hereby demised such a quantity of minerals as shall be sufficient to produce royalties at least equal in amount to the said dead or certain rent and shall in either of the next succeeding half-years' work obtain and bring to the surface such a quantity as will be sufficient to produce royalties in excess of such dead or certain rent, then and in such case and so often as the same shall happen, it shall be lawful for him or them to retain and keep back as much of the royalties otherwise payable thereon as will be equal to the loss sustained by such deficient workings.

Yet so nevertheless, that during the said term there shall always be paid at the least the dead or certain rent hereby reserved, whatever may be the quantity wrought, and so that no deduction for the deficiency in any half-year be made except in one or either of the next succeeding half-years.

#### *Clause F.*

Provided also, and it is hereby further agreed and declared that although in the process of working the minerals hereby demised there may be by arrangement between the said A. B., his executors, &c., and his and their workmen, or according to custom, or by breakage or otherwise sent out under the denomination of "Large Coal" as great a proportion of small coal as 120 lb. in every ton known as colliers' ton of 2,640 lb. of coal passed over the weighing machine or a still greater proportion, yet nevertheless the

Breakage  
clause.

royalty hereinbefore reserved on large coal shall be payable upon every 2,520 lb. of every such ton, and the royalty hereinbefore reserved on small coal upon the remaining 120 lb. thereof, whatsoever may be the actual proportions of large and small coal respectively therein, it being the intention of the parties hereto that the said A. B., his executors, &c., shall not for any cause or upon any pretence be entitled to the benefit of the small coal royalty hereby reserved upon a greater proportion than 120 lb. of every 2,640 lb. of coal worked and obtained as large coal and that no abatement of royalty or allowance on weight either in respect of breakage or upon any pretext whatever shall be made in regard to any minerals other than coal.

*Clause G.*

Definition of  
large and  
small coal.

And it is hereby agreed and declared that the term large coal shall include all coal that will not pass through a screen the bars of which are one inch asunder, and the term small coal shall include all coal that will pass through such a screen.



LETTER referred to, p. 356. Note to s. 51 (f) (2) (b).

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COPY.

WHITEHALL,

31st May, 1881.

A  $\frac{5121}{2}$

SIR,

THE Secretary of State having submitted a case for the opinion of the Law Officers of the Crown as to the interpretation of the requirement in Section (8) (f) (2) (b) 51 (8) (f) (2) (b) of the "Coal Mines Regulation Act, 1872," making it obligatory on the persons ordinarily employed in the mine to be out of the mine when gunpowder is used under the circumstances specified in the Rule, I am directed to acquaint you that the Attorney and Solicitor General have given it as their opinion that the terms, "person ordinarily employed in the mine," in s. 51 (8) (f) (2) (b), would include the night shift, consisting of labourers engaged in making ready the mine for the mining operations of the miners constituting the day shift, so as to make it obligatory for the persons employed in the night shift to be out of the part of the mine when and where gunpowder is used under the circumstances already referred to. They think the distinction intended to be drawn is between those ordinarily employed in the mine, in whatever capacity, and those specially employed in the blasting operations.

I am, Sir,

Your obedient Servant,

(Signed) GODFREY LUSHINGTON.

INSPECTOR OF MINES.



## INDEX.

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### ACCIDENTS IN MINES, 257—279.

causes of, 257.

liability of master for, 257

(see head of Employers' Liabilities.)

### AGENT, 138, 378.

definition of, 138.

contracts by, 139, 140.

general and special agents, 139.

powers of agents, 140.

### AGREEMENT FOR A LEASE, 39.

distinction between lease and agreement, 39.

### AMBIGUITY, 35.

in a deed, evidence to explain, 35.

### ARTIFICER,

who is under the Truck Act, 290—292.

### ARTIFICIAL WATER-COURSES, 119.

prescriptive claim to, 107, 108.

### AVERAGE CLAUSE, Appendix.

### BANKRUPTCY,

of a master, Addenda.

of one partner, 133.

clause in lease to provide for, Appendix.

## BARRIERS (see Inundations and Barriers),

covenant to leave, 56, 205.

breaking through, liability for, 216.

principle of law relating to, 216—233.

## BILLS OF SALE ACTS, 1878, 1882, 96, 97.

assignments of trade machinery require registration, 96.

trade machinery defined, 97.

Bill of Sale to be attested and registered within seven days, 97.

## BOYS,

age of, to be employed underground, 307.

## BREAKAGE,

clause in lease relating to, Appendix.

## BRICKFIELDS,

poor-rate upon, 185.

## BUILDINGS,

right to support for, 198, 200, 202.

## CAMPBELL'S (LORD) ACT, 279.

## CANALS,

law as to minerals under, 256.

## COAL,

property in, 1.

right to work when severed from surface, 18.

stealing from adjoining mine, 239.

lying under railways and canals, 243—256.

power to work by limited interests, 19—22.

winning by instroke, 59.

winning, 60.

## COAL MINES REGULATION ACT, 1872,

employment of women, young persons, and children,  
307—315.

wages, 316—322.

single shafts, 322—326.

COAL MINES REGULATION ACT, 1872 (*continued*),  
division of mine into parts, 326, 327.  
certificated managers, 327—335.  
returns, notices, and abandonments, 335—339.  
inspection, 339—345.  
arbitration, 345—349.  
coroners, 349, 350.  
general rules, 351—363.  
special rules, 363—368.  
penalties, 368—376.  
miscellaneous, 376—380.  
interpretation of terms, 377.  
schedules, 381—384.

COLLIER,  
contract of hiring, 137—153.  
form of contract with, 142.  
unwritten contract with, 137.  
the case of new colliers, 140.  
how contracts may be terminated, 145.  
stoppage of work, 146.  
duty of master to find work, 148—153.  
mutuality of contract, 148.  
(see head of Contract.)

COLLIERIES,  
rating of, 159.

COMBINATION OF WORKMEN, 157, 158, 297—299.  
(see Conspiracy, &c., Act.)

COMMONS,  
minerals under, 11—16.  
inclosure of, 14, 207.  
injury to surface of, 207—213.  
statutes as to inclosure, 14, 15.

COMPENSATION,  
to relatives in case of deaths, 257—279.

CONDITIONS IN LEASES, 37, 38.

CONSEQUENTIAL DAMAGES FOR TRESPASS, 237.

CONSPIRACY AND PROTECTION OF PROPERTY  
ACT, 1875, 157, 158, 297—299.  
    procedure under, 298, 299.

CONSPIRACY, DEFINITION OF, 301.

CONSTRUCTION OF COVENANTS, 35, 54—62.  
    of grant, 101—106.

CONTRACT OF SERVICE, 137—153.  
    general hiring, 141.  
    express and implied contracts, 142—144.  
    who may enter into, 138.  
    by agents, 138.  
    form of, for engaging colliers, 142.  
    effect of customs and usages, 143, 144.  
    how terminated, 145.  
    mutuality of, 148.  
    rescission of, 155.

CONTRACTOR,  
    responsibility of, for accidents, 258.

CONVEYANCING ACT, 1881, 46—48.

COPYHOLDER,  
    waste by, in working minerals, 20.

COPYHOLDS,  
    tenure of, 4.  
    property in coal, under, 4—11.  
    Enfranchisement Act, 11.  
    customary and prescriptive rights, 9.

COVENANTS IN LEASES, 34.  
    construction of, 35, 54—62.  
    how made, 34.  
    what are usual in leases of coal, 36.  
    to work coal, 49—61.  
    to leave a barrier, 56, 205.  
    running with the land, 62—65.  
    construction of, as to instroke, 57—59, 61.  
    various forms of, Appendix.

CRIMINAL LAW as to collieries, 302—305.  
as to taking coal out of bounds, 239.

CUSTOMS must be reasonable, 9, 10.

DANGER,  
notice to be given by Inspector, 341.

DEMISE (see Lease).

DISTRESS FOR RENT, 72.

EASEMENTS (see Ways).  
definition of, 98.

ECCLESIASTICAL persons, waste by, 20.  
leases by, 27.

EJECTMENT (see Lease).  
for non-payment of rent, 73.  
right of re-entry, 42—48.

EMPLOYERS' LIABILITIES, 257—279.  
for injury to stranger through negligence of workman,  
257.  
for injury to stranger where contractor employed, 258.  
act must be incidental to authority, 259.  
doctrine of common employment, law before last Act,  
260—262.  
definition of actionable negligence, 263.

EMPLOYERS' LIABILITY ACT, 1880, 263—279.  
notes to sections 1 and 2, 265—270.  
what is a "defect in the condition," 266, 267.  
workman may contract out of Act, 268.  
"person having superintendence," 269.  
meaning of "railway," 270.  
"charge or control," 269, 270.  
limits of sum recoverable and time of recovery, 271.  
money payable as penalty to be deducted, 272.  
trial of action, 272.  
mode of serving notice of injury, 273—278.

## ENGINES,

- offence of pulling down, &c., 303.
- under whose charge to be, 358.

## EQUITABLE RELIEF FOR BREACH OF COVENANT, 44.

## EXCEPTIONS IN LEASE, 31, 103.

## FAULT, as boundary, 238.

- clause requiring trials, Appendix.

## FENCE,

- duty to make, for shafts, 357.

## FIRING MINES,

- maliciously, 303.

## FIXTURES,

- meaning of, 81, 82.
- between heir and executor, 83.
- between executor of tenant for life or in tail, and remainder-man, 83.
- between landlord and tenant, 84.
- when they must be removed, 85—87.
- when distrainable, 87, 88.
- as affected by local customs, 91.
- between vendor and vendee, 91.
- between mortgagor and mortgagee, 88—90.
- special agreement as to, prevails, 92.
- stipulations in leases relating to, 92—95.
- effect of Bankruptcy Act, 1883, as to, 96.
- Bills of Sale Acts, 1878, 1882, 96, 97.
- (see Bills of Sale Act.)

## FORFEITURES, 42—48.

- acceptance of rent after, 42.
- Conveyancing Act as to, 46—48.
- waiver, 43.

## FRAUDS,

- Statute of, as to leases, 24.
- as to contracts, 137.
- as to surrenders, 66.

## GENERAL RULES FOR COLLIERIES, 351—363.



GRANT, CONSTRUCTION OF, 101—106.

HIRING (see Collier).

contract of, by agents, 139.

of colliers, 137—153.

INCLOSED COMMONS,

coal under, 3, 14.

INCLOSURE ACTS, 14, 15.

as to injuries to the surface, 207.

INJUNCTIONS, WHEN GRANTED, 239.

INJURIES FROM MINING, 195—212.

INJURIES TO SURFACE LANDS FROM MINING, 195—216.

divisible under three heads, 195.

(1) *Where no contract*, 195.

when cause of action first arises, 198.

subjacent support, 196.

adjacent support, 197.

new buildings, 198.

definition of adjacent lands, 199.

buildings erected twenty years, adjacent support, 200.

buildings erected twenty years, subjacent support, 202.

(2) *Where title involved*, 203—207.

(3) Excavations under commons, 207—213.

custom to work under without compensation for injury bad, grant good, 209.

summary of the law, 213—215.

(see further under Inundations and Barriers, and Working out of Bounds.)

INSPECTION OF COLLIERIES, 339—345.

the statute, 339—345.

extent of ventilation required, 351.

liability for contravention of general rules, 362.

INSTROKE AND OUTSTROKE,  
clause to secure, Appendix.

INSTROKE,  
working adjacent seams by, 57—59, 61.

INTIMIDATION BY WORKMEN, 158.

INUNDATIONS AND BARRIERS, 216—233.  
the rule of law on the subject, 216.  
leading cases, 217—232.  
water flowing by gravitation to lower mine, 224.  
damage through escape of artificial water, 225.  
vis major—extraordinary rainfall, 227.  
water discharged into neighbouring mine, 229—232.  
injunction where working will destroy mine and adjoining  
mine, 232.

JOINT STOCK COMPANIES ACT, 134, 135.

LAND,  
legal meaning of, 29.

LEASE, 23—48.  
nature and meaning of, 23, 24.  
how made, 25.  
effect of Statute of Frauds, 24.  
must be by deed, 24.  
by whom may be granted, 25—27.  
parts of a lease, 29.  
description of minerals demised, 29.  
grant of liberty to work, 30.  
rights and reservations in, 31.  
the rents reserved, 32.  
as to leases in the north, and elsewhere, 33.  
the covenants, 34—36 (see Covenants).  
provisoes and conditions, 37, 38.  
distinction between lease and licence, 39.  
between leases and agreements, 39, 40.  
re-entry after notice, 41.  
forfeiture and waiver, 42.  
re-entry after forfeiture, 43—48.

LEASE, 23—48 (*continued*).

licence to assign, 45.

lease of a colliery, Appendix.

do. with schedules, Appendix.

do. coal in settled estate, Appendix.

do. of a way-leave and railway, Appendix.

effect of Conveyancing Act, 1881, 46—48.

how determined, 65—69.

## LICENCE,

to work minerals, nature of, 39, 69, 70, 71.

to assign a lease, 45.

to work, how it differs from a lease, 69.

how granted, 74.

## LIMITATIONS, STATUTE OF, 4, 241, 242.

## LORD CAMPBELL'S ACT, 279.

## LORD OF MANOR,

his right to minerals in commons, 11—14.

do. in copyholds, 4.

## MACHINERY (TRADE), 97.

## MANOR, 16.

evidence of, 17.

## MANORIAL RIGHTS IN MINERALS, 14.

## MANSLAUGHTER, 280—285.

definition of, 280.

neglect to put up air-headings, 281.

neglect as to stage, 281, 282.

death from joint negligence, 284.

error of judgment, 284.

negligence must be personal, 285.

## MASTER AND SERVANT,

the contract between, 136.

the contract, written or verbal, 137.

express and implied contracts, 137.

competency to contract, 138.

contracts by agents, 138—140.

- MASTER AND SERVANT (*continued*),  
the contract of hiring and service, 141.  
form of contract with colliers, 142.  
implied contract, founded on usage, 142, 143.  
general and special rules, 144.  
termination or rescinding thereof, 145.  
stoppages of work, 146, 147.  
mutuality of contracts, 148.  
right to employment, and duty of finding it, 149—153.  
disputes between masters and colliers, 154—158.  
Employer and Workman's Act, 1875, 154—157.  
Conspiracy Act, 1875, 157, 158.  
recovery of wages, 155—157.  
bankruptcy of master, *Addenda*.
- MINE, 376.
- MINERALS, RIGHT TO WORK, 18—22.
- MOLESTATION, 299.
- MORTGAGEE,  
lease by, 27.
- MUTUALITY OF CONTRACTS, 148.
- NEGLIGENCE (see Employers' Liabilities).
- NOTICES UNDER THE STATUTE,  
of breach, 41, 43.  
under Railways Clauses Act, 244, 248.
- OCCUPIER,  
who is rateable as such, 161.  
owner of mine, 377.
- PAROL,  
evidence to explain a deed, 35.
- PARTNERSHIP,  
definition of, 126—128  
how formed, 128.  
powers of each partner, 129.  
good faith required, 130.

PARTNERSHIP (*continued*),

- negligence, 130.
- disputes between partners, 131.
- commencement of liability of each partner, 131.
- liabilities of partners, 130—132.
- as to negotiable instruments, 132.
- dissolution of, 132.
- mines, 133.
- bankruptcy of firm or partner, 133.
- joint ownership of minerals, 133.
- rule as to survivorship, 133.
- rule in Equity as to property of, 133.
- Joint Stock Companies, 134, 135.
- plan, 377.

## POOR-RATE (see Rating).

## PRESCRIPTION,

- title by, 77.
- does not entitle to the coal itself, 2.
- Act for shortening time of, 78, 79, 80.

## PROPERTY IN COAL, 1.

## PROVISOS,

- in leases, 37, 38.

## PULLING DOWN ENGINES, &amp;c.,

- punishment of, 303.

## RAILWAYS,

- minerals under, 243—256.
- notice of working under, 244, 248.
- amount of compensation, 246.
- Clauses Act, as to minerals, 243—247.
- company not entitled to minerals, 243.
- mines near railway, 244.
- mining communications, 245.
- compensation for injury to mines, 246.
- compensation for air-way, &c., 247.
- power to company to inspect, 247.
- penalty for refusal to inspect, 247.
- where mines worked contrary to Act, 247.

## RATING OF COLLIERIES, 159.

- Union Assessment Act, 160.
- occupiers, who are for rating, 161.
- beneficial occupation, 164.
- basis of valuation, 167.
- methods of valuation, 168.
- decisions of the Courts on valuation of mines, 169.
- improved values, 172.
- definitions of rent, 172.
- adjustment of royalties, 176.
- legal deductions from gross estimated rental, 177.
- form of a valuation, 180.
- royalty, nature of, 181.
- brickfields, rating of, 185.
- summary of rating law, 189.
- rating collieries not worked, 189.
- coal and shaft in different parishes, 190.
- coal under the sea, 190.
- way-leaves, rating of, 191.
- duties of overseers, 193.
- local customs, 194.

## RE-ENTRY,

- after notice, 41.
- after forfeiture, 43—48.
- proviso modifying, Appendix.

## REGISTRATION OF DEEDS, 76.

## RENT,

- cannot be reserved in licence to work, 71.
- reservation of, in lease, 32.
- distress for, 72.
- ejectment for non-payment of, 73.
- definition of, 172.

## RESCINDING OF CONTRACTS, 155.

## RESERVATION OF MINERALS,

- construction of, 61, 206.

## RULES,

general, 351—363.

special, 363—368.

how published and proved, 367.

SALE, BILLS OF, ACTS, 96, 97.

SERVITUDE OF LOWER LANDS, 222—232.

SETTLED LAND ACT, 1882, 26, 27.

SHAFT, 377.

SINKING THROUGH UPPER SEAM,

right of, 31.

STAMPS ON LEASES, COUNTERPARTS, AGREEMENTS,  
&c., 74—76.

STATUTE FOR THE REGULATION OF COAL MINES,  
307.

STEALING COAL,

from adjoining mine, 239.

from any vein, 302.

STOPPAGES OF WORK, 146, 147.

of wages, when legal (see Truck).

STRIKES, 300, 301.

SURFACE (see Injuries from Mining, 195—216).

TITLE, 77, 203—207.

TRESPASS UNDERGROUND (see Working out of Bounds).

damages for, 233—242.

TRUCK, 286—296.

definition of, 286.

enactments of the statute, 286—289.

who are artificers within it, 290—292.

the case of butty colliers, 292.

stoppage from wages, 293—296.

rent, timber, medical clubs, 287, 288.

goods voluntarily bought at employer's shop, 295.

payment in spoiled goods, 295.

UNCERTAINTY OF EMPLOYMENT, 149—153.

UNDERGROUND FLOW OF WATER, 222—232.

VENTILATION,

neglect of, causing death, 281.

WAGES (see Contract, Master and Servant, Addenda).

WAIVER,

of forfeiture, 42—48.

how limited by statute, 46—48.

WASTE,

by tenant in tail and tenant for life, 19.

by copyholders, ecclesiastical persons, 20.

by mortgagees, &c., 21.

remedy against, 22.

WATER,

flowing, general rules, 107.

courses, prescriptive claim to, 107, 108.

appropriation of, 108.

abstraction of, remedy for, 109, 110.

rights acquired by user, 109.

in subterraneous courses, 110—114.

diversion of, for irrigation, 115

taken from a spring head, 116—118.

defilement of, 119.

right to artificial streams, 119—125.

servitude of lower lands to receive, 228.

flowing by gravitation into lower mine, 224.

sent down by acts of occupier above, 229—232.

water-ways, clause regulating, Appendix.

WAY-LEAVES,

reservation of, 31.

when it will include a railway, 101—104.

underground, 105, 106.

rating of, 191.



## WAYS,

- different kinds of, 98.
- how acquired, 99.
- how claimed by prescription, 99.
- established by custom, 99, 100.
- way of necessity, 100.
- appurtenances, and in gross, 101.
- grant by owner of limited estate, 101.
- leading cases as to construction of grant, 101, 102.
- right to, how extinguished, 104.
- effect of Inclosure Acts upon, 105.
- underground ways, 105, 106.
- obstruction of, 105.

## WELL,

- dried up by act of neighbour, 110.

## WINNING COAL,

- meaning of the term, 60.

## WOMAN, 378.

## WORKING AT A LOSS, 49—53.

## WORKING OUT OF BOUNDS, 233—242.

- modes of compensation for, 233—235.
- summary of rules as to damages, 236.
- boundary by a fault, 238.
- may be treated criminally, 239.
- Statute of Limitations, 241, 242.
- inspection order, where granted, 242.
- fault as boundary, 238.

## WRITTEN CONTRACTS,

- with colliers, form of, 142.

## YOUNG PERSON, 378.

THE END.





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